Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. *and* Congreso de Uniones Industriales de Puerto Rico. Cases 24–CA–8570, 24–CA–8579, 24–CA–8624, 24–CA–8629, 24–CA–8637, 24–CA–8747, 24–CA–8807, 24–CA–8893, and 24–CA–8974–1

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND MEISBURG

On May 23, 2003, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The central issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by barring the Union's chosen representative from its facilities and by refusing to bargain with him, allegedly because of his misconduct.[3] In his decision, the judge found that the Respondent's actions violated the Act because the union representative's misconduct was not so serious that his presence would render good faith bargaining impossible or futile. For the reasons that follow, we disagree with the judge and reverse his finding.

II. FACTUAL BACKGROUND

The relevant facts, as set forth more fully in the judge's decision, are as follows.

The Respondent is engaged in the importation, manufacture, and sale of grains, animal feed, and other related products. Since 1987, the Union has been the exclusive collective-bargaining representative of the Respondent's production and maintenance employees. Since 1992, José A. Figueroa has been the Union's president and its designated representative for administering and negotiating agreements and for handling grievance and arbitration matters with the Respondent.

On May 27, 1998, following an incident in which Figueroa allegedly threatened to "tear off" the head of a supervisor and invited him outside to fight, the Respondent informed Figueroa that he would no longer be allowed access to any of its facilities. When Figueroa received the May 27 letter, he complained to the Respondent that banning him from the facilities was a violation of the parties' collective-bargaining agreement, which states that union representatives "will have access to the offices and the premises" of the Respondent "to deal with Union matters . . . ." After May 27, Figueroa continued to conduct union business in the Respondent's administrative offices but no longer met with employees in the Respondent's facilities.

Approximately 2 years later, Figueroa's conduct was again called into question. On May 9, 2000,[4] during a phone conversation with the Respondent's human resources director, Luis Juarbe, Figueroa became furious over Juarbe's position concerning an information request. Figueroa told Juarbe that if he would not change his position, they would have to resolve their pending issues by "exchanging blows." In response to hearing other voices coming from Figueroa's end of the conversation, Juarbe asked whether Figueroa had put their conversation on speakerphone; Figueroa denied this and stated that he was alone. Juarbe then asked if Figueroa's statement about exchanging blows was intended as an invitation to fight. Figueroa responded, "You take it any way you want to."

On May 12, an anonymous recorded message was left on Juarbe's answering machine. The message began with an unidentified voice stating, "One has to be killed. One has to be taken away, whichever, and I will start with the trunk. I will watch him go through." The next voice on the tape, subsequently identified as Figueroa's, replied, "That's the son of a bitch, Jose Gonzalez. That's the trunk."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We correct the judge's inadvertent omissions from the Order and notice and amend the Order and notice to include a requirement that the Respondent make whole employees for any monetary losses suffered as a result of the Respondent's unlawful discontinuation of the $500 bonus payments, and to reflect the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unlawfully encouraging employees to bypass the Union and deal directly with the Respondent.

[3] This is the only unfair labor practice finding to which the Respondent has excepted.

[4] Unless otherwise noted, all subsequent dates refer to 2000.

Juarbe immediately reported the message to Jose Gonzalez, the Respondent's president, who instructed Juarbe that the Respondent should have no further contact or communications with Figueroa. The Respondent also filed a criminal complaint regarding the threatening phone message.

On May 19, Juarbe sent a letter to the Union's board of directors, notifying them that due to Figueroa's behavior, the Respondent would no longer have any contact or dealings with Figueroa.[5] The letter further advised that while Figueroa was prohibited from entering its facilities, any other union officials were "welcome to come, visit, bargain, and communicate with us."

III. THE JUDGE'S DECISION

The judge found, inter alia, that the Respondent violated Section 8(a)(5) and (1) by denying Figueroa access to its facilities and by refusing to bargain with him as the Union's chosen representative. The judge's decision was based upon his conclusion that "Figueroa's misconduct, while objectionable, was not so serious as to have prevented the Respondent from engaging in meaningful negotiations with the Union through him." For the reasons that follow, we disagree with the judge's conclusion and find that the Respondent's decisions to exclude Figueroa from its facilities and to refuse to meet with him did not violate the Act.

Analysis

The Board has long recognized that "each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), enfd. sub nom. *Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982). A party's right to select its representative, however, is not absolute, and the other party is relieved of its duty to deal with a particular representative when that representative's presence would render collective bargaining impossible or futile. Id. The test is whether there is "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976).

The Board's analysis of whether an individual representative has engaged in conduct such that his or her presence would make good faith bargaining "impossible" is essentially a factual inquiry. In the instant case, the facts, considered as a whole, indicate that this standard has been met.

As an initial matter, we note, as the judge discussed, that Figueroa's misconduct in 2000 occurred against the background of his already troubled history with the Respondent. It is undisputed that in May 1998, the Respondent barred Figueroa from all or most of its facilities based on an allegedly similar incident. The Respondent could reasonably consider the 1998 bar in conjunction with the incidents in 2000 in deciding that a complete bar was warranted.[6] Furthermore, the Respondent's 1998 bar against Figueroa was still in effect in 2000, when the events at issue took place.

In addition, we find it significant that Figueroa actively participated in making an apparent death threat against the Respondent's president, Jose Gonzalez. The seriousness of such a threat, considered in the context of Figueroa's prior misconduct as well as his May 9 telephone conversation with Luis Juarbe, would reasonably create significant ill will such that good-faith bargaining would be impossible if the Respondent were required to bargain with Figueroa as the Union's representative. Accordingly, we find that the Respondent's decisions to bar Figueroa from its premises and to refuse to bargain with Figueroa did not violate Section 8(a)(5) and (1) of the Act.

Contrary to the judge's decision, we do not find that Figueroa's participation in the apparent death threat was limited to "a failure to disavow someone else's threat." Rather, we find that, by identifying Gonzalez by name as the person to be killed, Figueroa played an active role in making the apparent death threat.

The judge found that the seriousness of Figueroa's threats was lessened by the fact that they were made on the telephone and were not made in the presence of employees. The evidence is ambiguous on the latter point. However, we need not resolve this factual issue. In view of the serious nature of the threat, we find it irrelevant whether employees heard it, and it is similarly irrelevant that it was made on the telephone.

[5] The Respondent also filed charges with the Board asserting that the Union, through Figueroa, had violated Sec. 8(b)(1)(A) and (B) of the Act by implicitly threatening Juarbe on May 9 and by failing to disavow, and thereby supporting, the May 12 threat to "assault and/or kill" Gonzalez. These charges resulted in Case 24–CB–2074, which was decided on summary judgment when the Union failed to file an answer to the complaint. The Board's decision was subsequently enforced by an order of the United States Court of Appeals for the First Circuit. *NLRB v. Congreso de Uniones Industriales de Puerto Rico*, No. 02-1197 (1st Cir. May 7, 2002).

[6] The fact that the prior incident involving Figueroa occurred 2 years earlier does not preclude the Board from considering its lingering effect on the relationship between the Respondent and Figueroa. See, e.g., *King Soopers, Inc.*, 338 NLRB No. 30 (2002) (misconduct occurring 4 years earlier was sufficient to establish that representative's presence would preclude good-faith bargaining).

Finally, we do not share the judge's view that the fact that the Respondent "met and dealt with Figueroa on several occasions after the May 12 incident on matters such as arbitration hearings and contract negotiations" refutes the Respondent's contention that Figueroa's presence would prevent good-faith bargaining. The meetings occurred "several days" after the May 9 and 12 incidents. Since the Respondent said on May 19 that it would no longer deal with Figueroa, it is reasonable to assume that these meetings occurred between May 9–12 and 19, when the Respondent implemented its decision to bar Figueroa from its facilities. It was not unreasonable for the Respondent to take 7–10 days to make such an important decision, and it was not unreasonable to deal with Figueroa while the matter was being considered. Further, the evidence does not establish that the Respondent was able to engage in good-faith bargaining in the presence of Figueroa after the May 9 and 12 incidents. To the contrary, the evidence establishes that, on those occasions when the Respondent met with Figueroa to negotiate after the May 9 and 12 incidents, the meetings were conducted by a mediator and the parties remained in separate rooms.

Accordingly, we conclude, on all the evidence, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to meet with Figueroa and by barring Figueroa from its facilities.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc., Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b):

"(b) Refusing to provide the Union with requested information, which it needs which it needs to comply with its statutory obligations as the unit employees' exclusive bargaining representative; refusing to deduct union dues from unit employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz; and urging employees to bypass the Union and bargain directly with the Respondent."

2. Substitute the following for paragraph 2(b):

"(b) Make employees covered by the Amelia collective-bargaining agreement whole for any loss suffered by the unlawful discontinuance of the guaranteed $500 annual bonus for the years 2001 to the present, plus interest."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in the terms and conditions of employment of our employees who are represented by Congreso de Uniones Industriales de Puerto Rico, without first notifying the Union and affording it an opportunity to bargain over any such changes.

WE WILL NOT fail and refuse to provide the Union with requested information that is relevant to and necessary for the Union in the performance of its statutory representative duties.

WE WILL NOT refuse to deduct union dues for unit employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz.

WE WILL NOT attempt to bypass the Union by encouraging employees to bargain directly with us.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights by urging them to abandon the Union and promising them unspecified benefits if they do so, by telling them that the

Union is bankrupt, or by telling them that the filing of charges with the Board would be a futile gesture.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the March 13, 2000 unilateral ban we imposed on employee use of cell phones in our facilities; the March 1, 2000 training program we unilaterally instituted for the CSV-40 machines; and our unilateral decision to discontinue the $500 bonus for employees, and WE WILL notify and, at the Union's request, bargain over these or any other change we wish to make in the unit employees' terms and conditions of employment.

WE WILL furnish the Union with the information it requested in its August 16, 2000 information request.

WE WILL, within 14 days from the date of the Order, reassign employees Javier Garcia and Luis Perez to the A-skill classification, without prejudice to the seniority or other rights and privileges previously enjoyed.

WE WILL make Javier Garcia and Luis Perez whole for any loss of wages or other benefits they may have suffered due to their unlawful demotion to the unskilled classification, with interest.

WE WILL make employees covered by the Amelia collective-bargaining agreement whole for our failure to pay the guaranteed $500 annual bonus for the years 2001 to the present, plus interest.

WE WILL accept the dues deduction applications from unit employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz, and begin deducting and remitting such dues to the Union.

PAN AMERICAN GRAIN CO., AND PAN AMERICAN GRAIN MANUFACTURING CO., INC.

Miguel Nieves, Esq. and *Vanessa Garcia, Esq.*, for the General Counsel.

Ruperto J. Robles, Esq. and *Rafael Lopez, Esq.*, for the Respondent.

Hector Santos, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. A trial in the above-entitled matter was held in San Juan, Puerto Rico, from July 29–August 2 and August 26–30, 2002, following the filing of charges by Congreso de Uniones Industriales de Puerto Rico (the Union), and issuance of a consolidated complaint and notice of hearing by the Regional Director for Region 24 of the National Labor Relations Board (the Board).[1] The complaint alleges that Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. (the Respondent) has, in various manners, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).[2] The Respondent, in a timely filed answer, denies having engaged in any unlawful conduct.

At trial, all parties were afforded a full and fair opportunity to examine and cross-examine witnesses, to submit oral and written evidence, to argue orally on the record, and to file posttrial briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Puerto Rico corporation, with offices located in Guaynabo, Puerto Rico, is engaged in the importation, manufacture, and sale of grains, animal feed, and other related products. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, purchased and received at its Arroz Rico facility goods valued in excess of $50,000 directly from points and places outside the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Allegations

As noted, the consolidated complaint alleges numerous violations of Section 8(a)(5) and (1) of the Act. The 8(a)(5) conduct complained of includes allegations that the Respondent sought to bypass the Union and deal directly with employees regarding their terms and conditions of employment; that it unilaterally implemented procedures for employees to request training on its production equipment; unilaterally established a ban on use of cell phones/beepers in the workplace; failed and was refusing to include certain employees in the bargaining unit represented by the Union and to deduct their Union dues; unilaterally changed the job classifications and reduced the wages of employees Javier Garcia, Luis M. Pérez, and Rodolfo Rodríguez and unilaterally changed the work schedule of an employee in contravention of his seniority rights; failed to pay certain unit employees a contractually required annual payment of $500; assigned bargaining unit work to nonunit employees; refused to provide the Union with requested relevant and necessary information; and refused to meet and bargain with José Alberto Figueroa, the Union's designated representative, with respect to grievances and denied him access to its facilities.

[1] Copies of the unfair labor practice charges filed by the Union in this case, along with copies of all pleadings and related documents filed by the parties are contained in GC Exh. 1. Exhibits offered into evidence by the General Counsel and the Respondent are hereinafter identified respectively as "GC Exh." and "R. Exh." followed by the exhibit number. Reference to testimonial evidence is identified by the transcript volume (e.g., I–IX) followed by the page number.

[2] Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc. constitute a single-integrated business enterprise and are a single employer within the meaning of the Act.

The 8(a)(1) conduct includes allegations that the Respondent interfered with the employees' Section 7 rights by telling them it would not negotiate with union officials because they were ill-mannered; that the Union was bankrupt; that filing grievances was a futile gesture; and by suggesting that employees abandon the Union.

B. Factual Background

The Respondent operates three main facilities known as the "Arroz Rico" plant, the "Amelia" plant, and the "Corujo" plant.[3] It also utilizes a shipping vessel, known as "*La Zorra*," as a storage facility. At all relevant times herein, its managerial/supervisory staff, all admitted statutory supervisors and agents as defined by the Act, included Company President Jose Gonzalez Freyre (Gonzalez), Human Resources Director Luis Juarbe, Plant Manager Antonio Jacobs, Operations Manager Geraldo Curet Salim (Curet), Maintenance Manager Noel Bajandas, and Supervisor Eduardo Aldeano.

Since June 11, 1987, the Union has been the exclusive collective-bargaining representative of the Respondent's production and maintenance employees, and has, since then, maintained successive collective-bargaining agreements with the Respondent. Since 1992, José A. Figueroa has been the Union's president and its designated representative for purposes of administering and negotiating agreements with the Respondent, and for handling grievance and arbitration matters.[4] The parties most recent agreements covered employees in the Arroz Rico, Corujo, and Amelia facilities under two separate agreements, and were effective from March 4, 1998, to March 4, 2002 (see GC Exh.-2; GC Exh.-3).[5]

The incidents and conduct alleged in the complaint as violations of the Act all occurred during 2000 and 2001. A discussion of the facts underlying the allegations, and my findings with respect thereof, follows.

[3] Other smaller facilities operated by the Respondent and of relevance here include a warehouse known as ALCA, situated adjacent to the Arroz Rico plant, and a grain elevator known as Silo 12, which is also situated in the vicinity of the Arroz Rico plant.

[4] Figueroa has worked for the Union since 1978. Figueroa's father, Arturo Figueroa (A. Figueroa), apparently was the Union's former president. The record reflects that A. Figueroa assisted his son, Figueroa, in negotiations with the Respondent (VIII:527–528).

[5] The Arroz Rico and Corujo production and maintenance employees were covered by the agreement (the "Arroz Rico" contract) received into evidence as GC Exh.-2, and the Amelia plant employees were covered under GC Exh.-3, the "Amelia" contract. Both agreements group employees into three separate classifications: A-skilled, B-skilled, and nonskilled. (See art. XIX of GC Exhs.-2–3.). At the Amelia plant, employees in the A-skilled classification include "mechanics, electricians, welders, heavy equipment, and finger lift operators (see GC Exh.-3, art. XIX). Given their higher skills, employees classified as A-skilled receive a higher hourly wage than employees in the other classifications. For reference purposes, and as so designated in complaint par. 6, the Amelia plant employee unit is herein described as unit A, and the Arroz Rico plant employee unit as unit B. The Arroz Rico plant handles Respondent's rice-producing operation; the Amelia plant is involved in the production of animal feed.

1. Figueroa's denial of access to Respondent's facilities

Since 1992, Figueroa has dealt with different managers and supervisors in the course of administering the parties' agreements, including Gonzalez, Juarbe, Curet, Jacobs, and others, as well as, Respondent's legal counsel, Ruperto Robles, and has done so through correspondence, phone calls, and by visiting the company premises. As to the latter, article III of the collective-bargaining agreement required Figueroa or any other union representative wishing to visit the Respondent's premises to first notify the plant manager or his designee of his intent.[6]

On May 27, 1998, Figueroa received written notice from Respondent's then human resources director, Ada Martinez, that he was no longer allowed access "to any of the [Respondent's] facilities and/or subsidiaries as an individual" because of an incident that occurred during the week ending May 22, 1998 (GC Exh.-4; I:44). The incident in question involved an encounter Figueroa had on May 19, 1998, with Mechanics Supervisor Marcos Figueroa as the former sought to enter the Arroz Rico facility. Figueroa explained that on that occasion, Marcos Figueroa, in an aggressive tone, told Figueroa he could not enter the facility without asking permission to do so. Figueroa disagreed, stating that the contract only required notification to, not permission from, the Respondent of his intent to visit the plant.[7] Figueroa claims that during the incident, Marcos Figueroa made flailing gestures with his hands and, at one point, actually hit him and invited Figueroa to step outside to fight. The incident, according to Figueroa, ended with the intervention of a plant manager (Tr. 47).

Neither Marcos Figueroa nor Martinez was called to testify. The Respondent, however, elicited testimony from Bajandas who stated that he was present during Figueroa's encounter with Marcos Figueroa. Bajandas' version is that on May 19, 1998, he was present when he heard Marcos Figueroa tell Figueroa he was not allowed to enter the facility without permission from a supervisor, and that Figueroa responded that he did not need anyone's permission, that he could enter and leave the plant when he wanted. Bajandas described Figueroa as being upset during this incident, and that Marcos Figueroa remained calm. At one point, Bajandas claims, Figueroa threatened to "tear off" Marcos Figueroa's head, and invited the latter to step outside to fight. Bajandas recalls Marcos Figueroa asking Fi-

[6] Art. III, sec. 2 of the parties' agreements reads as follows:

> The Union shop steward and the [Union] representatives will have access to the offices and the premises and the work shops of the Company to deal with Union matters and they may do so, if they so wish, accompanied by their legal advisors. These visits will be made during work hours as long as they notify the plant manager and/or the person designated by him of their wish and need to visit the plant. The manager or authorized representative may accompany the [Union] representatives during his visit. It is understood that if there is no security guard at the gate, the [Union] officer may enter the office but he or she must immediately identify himself or herself with the supervisor of the department that he wishes to visit and inform him about his need to visit the department.

[7] A plain reading of art. III, sec. 2 appears to support Figueroa's position, for the provision makes no mention of permission being required for a plant visit. Rather, the provision, as noted, requires only that the union representative notify the manager or other authorized representative of his desire to visit the plant.

gueroa if his remark was intended as a threat, and Figueroa responding that it was, and that if he didn't like it, they could work it out, but that in any event, he was still going to tear off Marcos Figueroa's head. According to Bajandas, another manager, Luis Ricardo Rivera, entered at that point and informed Figueroa that he would have to follow company rules. Bajandas claims that as he was leaving, Figueroa remarked that Respondent's managerial personnel, including Gonzalez, viewed themselves as "gods." (VII:340-345).

Bajandas concedes that he never saw Figueroa actually assault Marcos Figueroa during this incident.[8] For his part, Figueroa denied Bajandas' claim that he threatened Marcos Figueroa during that incident, or that he had not followed the proper procedures for gaining access to Respondent's facilities (II: 231; 233). As Marcos Figueroa was not called to testify, and as Bajandas did not see Figueroa assault Marcos Figueroa, I credit Figueroa's denial that any assault took place during that incident.

Figueroa testified that on receiving the May 27, 1998 letter, he complained to Martinez that the Respondent was violating the collective-bargaining agreement by banning him from Respondent's facilities. Although banned from the plants themselves, Figueroa nevertheless had been allowed access to the Respondent's administrative offices.[9] However, on May 19, 2000, the Respondent extended the ban to include its offices. (Tr. 238.) The May 19, 2000 total ban on Figueroa's access to the facilities was precipitated by two separate incidents which occurred on May 9 and 12, 2000.

The May 9 incident involved an implicit threat made by Figueroa to Juarbe during a phone conversation they held that day. Juarbe testified to receiving a call that day from Figueroa inquiring about some pending cases that needed to be discussed. Although admitting that he had a poor recollection of what was discussed during that conversation due to the passage of time, Juarbe nevertheless did recall that at one point during the conversation, Figueroa became furious because he was not getting the answers he expected from Juarbe. He further recalled Figueroa stating that if this was how it was going to be, they would have to resolve their pending issues by exchanging blows.[10] Juarbe claims that during this phone conversation, he heard "voices" at Figueroa's end and suspected that Figueroa had put their conversation on a speakerphone, and that when he questioned Figueroa about it, the latter denied that a speakerphone had been turned on or that there was anyone present with him.[11] Juarbe purportedly then asked Figueroa if his comment about "exchanging blows" was intended as an invitation for him (Juarbe) to fight Figueroa, to which the latter purportedly replied, "You take it any way you want to." (VI:98.) Juarbe claims he then reported the matter to Gonzalez who instructed him to contact their attorneys. No decision, however, other than the filing of charges with the Board, was taken to discontinue any further contacts with Figueroa as a result of this incident.

The May 12, 2000 incident involved a recorded message left on Juarbe's answering machine containing a threat directed at Gonzalez. Juarbe testified that he had spoken to Figueroa on many other prior occasions and was, therefore, able to recognize Figueroa's voice on the recording. At the hearing, Juarbe identified, from the transcript of the recording, certain statements purportedly made by Figueroa.[12] Juarbe reported the phone message to González and both, along with Jacobs, heard the recording, after which González purportedly instructed Juarbe to contact their legal counsel and find out what they should do (VI:120). Soon thereafter, Gonzalez instructed Juarbe that the Respondent should have no further written, verbal, or physical contact with Figueroa. By letter dated May 19, 2000, addressed to the Union's board of directors, Juarbe notified the Union that due to Figueroa's "unruly behavior," the Respondent would "no longer have any contact either in writing

[8] Bajandas' testimony in this regard contradicts an assertion made by Respondent in a subsequent March 21, 2000 letter to Figueroa claiming, inter alia, that the latter had "physically assaulted" Marcos Figueroa during the May 19, 1998 encounter (see VII:368; GC Exh.-20).

[9] Figueroa filed a charge with the Board alleging the denial of access as unlawful, which matter, along with other allegations, including a charge filed by the Company against the Union accusing Figueroa of misconduct, was the subject of an earlier complaint. A hearing before me on the complaint allegations was held on February 9, 2000. At the start of the hearing, the parties entered into a non-Board settlement agreement resulting in a withdrawal of all charges filed by the parties. (See GC Exh.-6). Figueroa claims that not long after the February 9, 2000 hearing, he learned that the Respondent's security guards had received instructions not to allow him into the facilities. He then wrote to Juarbe asking to be allowed into the Respondent's facilities, but by letter dated February 16, 2000, Juarbe referred him to Martinez' May 27, 1998 letter denying him access (GC Exh.-5). While claiming that the Respondent's February 16, 2000 reflects Respondent's intention not to comply with the parties' February 9, 2000 settlement agreement, the General Counsel has not sought to have the settlement agreement set aside (GC Br. :49). Nor, for that matter, does the Respondent claim that the current allegation involving its refusal to allow Figueroa access to any part of its facilities was resolved by that settlement agreement.

[10] The translation provided at the hearing to Juarbe's testimony as to what Figueroa actually said was that they would have "to resolve this matter in a slapping of each other's faces." (VI:97.) This literal translation of Figueroa's remark by the official court interpreter at the hearing does not, in my view, accurately reflect the true meaning of Figueroa's comment. Rather, a more accurate translation of Figueroa's comment is that they would have to resolve the matter by "exchanging blows" or a "fist fight."

[11] On brief, the Respondent, apparently relying on Juarbe's version of the May 9, 2000 phone conversation between the latter and Figueroa, states that Figueroa made his "fist fight" remark "while in the presence of employees." (R. Br. 33.) Juarbe, however, testified only to having heard "voices" in the background, and never stated that the "voices" belonged to employees. In fact, nothing in Juarbe's testimony suggests that he knew where Figueroa was calling from. The Respondent's assertion on brief, therefore, that Figueroa made his remark in the presence of other employees lacks evidentiary support.

[12] A transcript of the recorded message, in Spanish and English, was received into evidence as R. Exh.-12. The recorded message, according to the transcript, begins with an unidentified voice commenting as follows: "One has to be killed. One has to be taken away, whichever, and I will start by the trunk. I will watch him go through." (See R. Exh.-12, p. 2, L. 22, p. 3, L. 3.) The following comment, "That's the son of a bitch, Jose Gonzalez. That's the trunk," was identified by Juarbe as having been made by Figueroa (VI:118). Juarbe, however, did not attribute the former "One has to be killed." comment to Figueroa.

or personally" with Figueroa, that he would not be allowed to visit "our offices," and that any messages and/or written documents from Figueroa would be returned and not received. The letter further advised the Union that while Figueroa was prohibited from entering its facilities, any of its other officers was "welcome to come, visit, bargain and communicate with us." The letter explains that the Respondent's decision was based on "Figueroa's participation in the acts that are stated in the charge in [Case] 24–CB–2074," and that it involved only Figueroa "in his personal and official capacity" (R. Exh.-13).[13] The Union, however, according to Juarbe, responded that Figueroa was the person designated to handle cases involving Pan American.

Juarbe claims that since May 12, 2000, the Respondent has repeatedly asked to meet with the Union to address second-step grievances, with the only caveat that someone other than Figueroa representing the Union at these meetings. Asked why the Respondent did not want him or other managers to meet directly with Figueroa, Juarbe replied that it was for their own safety because of the "other violent incidents" that had "already occurred with" Figueroa. Yet, Juarbe concedes that despite this purported safety concern over meeting with Figueroa, he, in fact, met and dealt with Figueroa on several occasions after the May 12, 2000 incident on matters such as arbitration hearings and contract negotiations. (VI:123; 125.) The Respondent on brief concedes that Juarbe did continue to meet with Figueroa "up until May 19, 2000" (R. Br. 31.)

The parties, however, are in agreement that, in response to the Respondent's requests for meetings, the Union for the most part declined to meet unless Figueroa, its designated representative, was allowed to attend, something the Respondent adamantly opposed. (VI: 125-126; 137; 152; R. Exh.-17.) Despite the Respondent's assertion that it would not accept any correspondence from Figueroa, Juarbe testified that at some point the Respondent changed its mind and began accepting Figueroa's correspondence pertaining to labor relations matters, but would direct its reply to the Union, not Figueroa (VII:249–250).

[13] Case 24–CB–2074 involved allegations that the Union, through Figueroa, had violated Sec. 8(b)(1)(A) and (B) of the Act by implicitly threatening Juarbe, during their May 9, 2000 phone conversation, with resolving their bargaining differences through fist fighting, and by failing to disavow, and thereby supporting, an employee's May 12, 2002 threat to physically assault and/or kill Gonzalez. On October 1, 2001, the Board in the above case issued an unpublished decision (336 NLRB No. 67) (not reported in Board volumes), pursuant to a summary judgment motion filed by the General Counsel based on the Union's failure to file an answer to the complaint, finding merit to the above allegations. A copy of the Board's decision was received into evidence as R. Exh.-1. The Board's decision was subsequently enforced by an order of a U.S. Court of Appeals for the First Circuit dated May 7, 2002 (R. Exh.-1).

The General Counsel's intimation on brief (GC Br. :50), that the violations found by the Board in its decision in Case 24–CB–2074 did not involve any threat made by Figueroa, is simply wrong, for the Board in its decision did indeed expressly find that Figueroa's May 9, 2000 remark amounted to an implicit threat to resolve their "bargaining differences by means of fist fighting."

Discussion

The General Counsel contends that the Respondent's refusal to meet with Figueroa, the Union's designated representative, to discuss grievances, and its refusal, since on or about May 19, 2000, to allow him to enter its premises, was unlawful and a violation of Section 8(a)(5) and (1) of the Act. The Respondent counters that Figueroa's May 9, 2000 invitation to Juarbe to resolve their bargaining differences through a fist fight, and his participation in, and failure to disavow, the threatening statements contained in the May 12, 2000 recording, both of which formed the basis for the violations found in Case 24–CB–2074, were the sole reasons for its decision to ban Figueroa from its facilities altogether (see VI:84; R. Exh.-13), and for refusing to have any further dealings with him.[14] It argues that its refusal to deal with Figueroa as the Union's representative was justified under the Board's holding in *Fitzsimmons Mfg. Co.*, 251 NLRB 375 (1980), because Figueroa's "unruly" behavior was so egregious that it rendered bargaining with the Union through Figueroa futile, if not impossible. I disagree with the Respondent.

In *Fitzsimmons*, supra, the question before the Board was whether an employer could lawfully refuse to bargain with the designated representative of the union who had engaged in certain misconduct. There, the union representative, during the course of grievance meeting, without provocation, and in the presence of other employees, threatened to punch the employer's representative in the mouth and "knock him on his ass," physically assaulted the employer's representative by grabbing him by his necktie and pulling him up to his feet, and then challenged him to step outside to the parking lot, presumably to fight. The Board in *Fitzsimmons* declined to find the employer's refusal to bargain to be unlawful. In so doing, the Board noted while parties to a collective-bargaining relationship are generally free to choose their own representatives, a party may nevertheless be relieved of its obligation to deal with a particular representative if the latter's presence during negotiations would render collective bargaining impossible or futile. Quoting from an earlier decision in *KDEN Broadcasting Co.*, 225 NLRB 25 (1976), the Board stated that the test for determining when such a refusal to bargain with a party's designated representative is justified is whether there is "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." *Fitzsimmons*, supra at 379. Applying that standard to the union

[14] Although Respondent, at the hearing and in its May 19, 2000 memo to the Union, made clear that the decision not to have any further dealings with Figueroa and to ban him entirely from the Respondent's premises, was prompted solely by the May 9 and 12, 2000 incidents, on brief the Respondent appears to argue that that decision was based on "a series of incidents which peaked during the month of May 2000," suggesting implicitly that other conduct purportedly engaged in by Figueroa prior to the May 2000 incidents, e.g., the 1998 incident involving Marcos Figueroa, also factored into that decision. This apparent change in position casts doubt on Respondent's overall assertion that its decision was prompted by Figueroa's misconduct. At a minimum, the Respondent's assertion on brief, which I reject as not credible, appears to be nothing more than a post hoc attempt to further justify its decision.

representative's conduct, the Board in *Fitzsimmons* found the conduct was sufficiently egregious as to have rendered bargaining with the union, through the representative, impossible, thereby justifying the employer's refusal to bargain. Id. at 379.

Here, there is no question, given the Board's decision in Case 24–CB–2074, that Figueroa did indeed engage in unacceptable behavior when, on May 9, 2000, he implicitly threatened Juarbe by inviting him to resolve their bargaining differences through a fist fight, and when, on May 12, 2000, he failed to disavow an implied threat made by some unidentified employee to Gonzalez in a recorded message. Figueroa's misconduct, however, is in no way comparable to the type of egregious behavior engaged in by the union representative in *Fitzsimmons*, supra. Thus, unlike the union representative in *Fitzsimmons*, Figueroa never physically assaulted Juarbe or any other manager, and his May 9, 2000 threat, unlike the union agent's conduct in *Fitzsimmons*, occurred during a one-on-one phone conversation with Juarbe and not in the presence of other employees, a factor which the Board in *Fitzsimmons* found added to the egregiousness of the union agent's conduct. It is patently clear, therefore, that while inappropriate, Figueroa's misconduct here was not as severe or as egregious as the union agent's misconduct in *Fitzsimmons*.

Nor was Figueroa's misconduct here as severe as that engaged in by a union representative in another case, *Victoria Packing Corp.*, 332 NLRB 597 (2000), which the Board found was not serious enough to have justified an employer's refusal to bargain with that representative. Thus, in *Victoria Packing*, supra, the union representative, during the course of a meeting attended by the company owner, a shop steward, and two other company representatives, engaged in a shouting match with the owner and, at one point, came up to the owner's face and while pointing a finger at him, shouted, "I'm going to get you and you're [sic] fucking company." The Board in that case upheld the judge's finding that the union representative's misconduct, while "rude" and possibly considered "excessive" in other settings, was not "the type of conduct which could reasonably be construed as tainting the bargaining process as long as he was involved." In so finding, the judge relied on the fact that representative's misconduct "was of an extremely short duration, and did not involve any "physical contact or explicit threat of force." The judge further explained that "[f]or better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior." *Victoria Packing*, supra at 600. The judge accordingly concluded, and the Board agreed, that the employer was not justified in refusing to meet and bargain with the union agent on the basis of his above-described misconduct.

Like the union representative's misconduct in *Victoria Packing*, supra, Figueroa's misconduct here did not involve any physical contact or an explicit threat. Rather, Figueroa's May 9, 2000 conduct, as found by the Board in Case 24–CB–2074, consisted of a single *implied* threat to Juarbe, while his May 12, 2000 misconduct did not involve a threat by Figueroa but rather a failure to disavow someone's else's threat. However, Figueroa's misconduct here differs from the union representative's conduct in *Victoria Packing*, supra, in that, in the latter case, the board agent's threat, as in *Fitzsimmons*, supra, occurred in the presence of others, e.g., two managers and one employee, whereas Figueroa's May 9, 2000 threat, as noted, did not. This factor thus renders Figueroa's misconduct less serious than that engaged in by the union agent in *Victoria Packing*, which latter conduct the Board, as noted, found was not sufficiently serious to justify an employer's refusal to bargain.[15]

In sum, I am convinced that Figueroa's misconduct, while objectionable, was not so serious as to have prevented the Respondent from engaging in meaningful negotiations with the Union through him. The Respondent, for its part, has presented no persuasive evidence to indicate that Figueroa's presence at the bargaining table would create ill-will and make good-faith bargaining impossible. Indeed, Juarbe's own testimony, that he continued meeting with Figueroa for several days thereafter, following the May 9 and 12, 2000 incidents on arbitration matters and for further negotiations, lays bare the Respondent's claim that Figueroa's misconduct had rendered good-faith bargaining with him futile or impossible. Accordingly, I find that Figueroa's misconduct did not justify the Respondent's May 19, 2000 decision to refuse to bargain with him as the Union's chosen representative, and to deny him access to its facilities, as required under the parties collective-bargaining agreement. The Respondent's decision in this regard, therefore, violated Section 8(a)(5) and (1) of the Act.

2. The ban on cell phone use

José Colón, an employee of the Respondent at its Arroz Rico facility since 1993, has been serving as union steward since sometime in early 2000. He testified to an incident that occurred on March 10, 2000, regarding his use of a cell phone. Thus, he recounted that as he was returning to work from his break on March 10, Aldeano called him to a meeting with Bajandas during which employee Rodolfo Rodríguez was to be instructed to work overtime. (IV:567–568.) Soon after the meeting, Colón used his cell phone while still inside the plant to call Figueroa to seek advice regarding the Rodríguez meeting. According to Colón, while he was on the phone, Bajandas approached him and "reminded" Colón that the use of cell phones during working hours was not permitted, that only management officials were permitted to do so, and that, if he wanted to speak with Figueroa, he had to do so outside of his normal working hours, and that under company rules, he could not have a cell phone inside the Company (IV:569). Colon claims he told Bajandas that the prohibition on the use of cell

[15] See also *Long Island Jewish Medical Center*, 296 NLRB 51 (1989), where a union agent's conduct in "lightly" pushing a manager during the course of a meeting in the presence of other employees, in calling the manager an "asshole" on several occasions, in preventing the manager from getting out from behind her desk, and in hurling "obscenities" at this and another manager on different occasions, was found not to have justified the employer's refusal to allow the agent onto its premises. Thus, the Board in *Long Island Jewish Medical Center* agreed with the judge that, while "distasteful," the union agent's conduct "did not constitute persuasive evidence that the [his] presence at the facility would create ill-will and make good-faith bargaining impossible." Id. at 72. Again, Figueroa's misconduct here, in my view, was not as egregious as that engaged in by the union agent in *Long Island Jewish Medical Center.*

phones in the plant facility was "news" to him, implying that Colon was unaware of any such restriction.

Bajandas' version of this incident is that after the meeting, he noticed Colón standing some 5 to 6 feet from the production area using a cell phone, and that he then went over and "reminded" Colón that he was not allowed to use a cell phone in the production area. Bajandas testified that the prohibition on the use of such phones extends only to the production area and is intended to prevent possible contamination of the product being packaged should the phone, beeper, or other loose object fall in (VII:346). According to Bajandas, he suggested to Colon during their discussion that if he needed to make a call to the Union or anyone else, he could do so by notifying a supervisor who would make a phone available to him in one of the supervisors' offices (VII:348-349; 382). The conversation, according to Bajandas, ended at that point. There is no evidence to show, nor does the Respondent contend, that Colon was using his cell phone while actually engaged in production work.

Colón testified that when he reported for work 3 days later, on March 13, 2000, he observed that a memo on the use of cell phones had been posted by Plant Manager Gustavo Lejardi next to the timeclock. Jacobs testified that he directed Lejardi to prepare the memo after observing an employee, Luis Velez, speaking on a cell phone while operating a "man lift." Jacobs claims that Velez was verbally warned about the incident. The March 13 memo was directed to all "Arroz Rico" employees and reads as follows:

> I want to remind you that the use of cellular telephones, beepers or other similar equipment is prohibited inside the plant and its perimeter. The use of this equipment will only be allowed to persons authorized by the management of Pan American Grain. Unauthorized personnel cannot have said equipment inside the plant. If any person ignores this regulation, the same will be disciplined as applicable.

Colón claims that at no time prior to May 10, 2000, was he aware of any company policy, written or otherwise, prohibiting the use of cell phones in the facility, and that he had observed supervisors using cell phones in the plant. He testified that at no time prior to the posting of the above memo did Lejardi or Jacobs ever prevent him from using his cell phone inside the plant (IV:645–646). According to Colón, on March 15, 2000, 2 days after he first saw Lejardi's memo, and as he was heading towards his work area, Aldeano approached and instructed him to leave his cell phone in his car because González had threatened to fire anyone caught with a cell phone.[16] (IV:570.)

Colon's testimony was corroborated, in part, by former employee David Arroyo Pino, who recalls seeing Colón using the cell phone following the March 10 meeting, and Bajandas informing Colón that he was prohibited from doing so. Pino further recalls seeing the March 13, 2000 memo posted on the bulletin board, and testified that at no time prior thereto had he seen any policy forbidding the use of cell phones at the Company. Pino testified that he had, in the past, observed employees and supervisors alike using cell phones inside the plant, but that after the March 13, memo was posted, he continued to see supervisors using cell phones but did not see any employees doing so. (III:426–427.)

The Respondent at the hearing conceded that prior to the March 13 memo, it had no written policy prohibiting the use of cell phones in the workplace (IV:607). It contends, however, that it has always adhered to certain Food & Drug Administration (FDA) safety guidelines known as "Good Manufacturing Practices" or "GMP" set forth in 21 CFR § 110, and that said guidelines form part of company rules that employees are expected to follow.[17] (VIII:410.) The Respondent claims that the general ban on the wearing of jewelry and other related items at the workplace contained in the GMPs incorporates, by implication, other items that an employee may wear or carry on his or her person, such as cell phones and beepers.

According to Jacobs, when he began working for Respondent in 1998, the use of cell phones and beepers "at the Pan American Grain plants" was prohibited, and the ban "reenforced (sic) . . . on different occasions." (VII:413.) Jacobs testified that the company rules found in Respondent's Exhibit-4 were written by him, and that employees were trained on the GMPs and received, during such training, copies of Respondent's Exhibit-4. He conceded, however, that Respondent's Exhibit-4 does not contain an express prohibition on the use of cell phones and beepers. Nevertheless, he contends that the Respondent treats items such as cell phones and beepers as "objects" within the meaning of Respondent's Exhibit-4, paragraph 5 because they can become dislodged from one's person and fall into the food processing area, contaminating the product. He explained that because of the danger of food contamination, employees "working directly with the product" are not allowed to have any loose items, such as jewelry, cell phones, beepers, etc., "on their person." He further admitted, however, that during the training given to employees on the GMPs, he never specifically mentioned that the use of cell phones was prohibited under paragraph 5. (VIII:425–427.) Asked by Respondent's counsel what, if any, condition is imposed on employees on the use of cell phones and beepers inside the plant itself, Jacobs explained that employees are "totally prohibited" from using said items while they are "operating . . . any type of equipment." (VIII:430.) His assertion in this regard, coupled with his explanation that the purpose of the ban on cell phones and other items, e.g., jewelry, during the operation of machinery was to prevent possible contamination of food products should they become dislodged, suggests that the alleged ban on cell phones, if one did exist, extended only to their use by employees during the operation of machinery, and presumably not to their use at other locations within Respondent's facilities. In fact, Jacobs' further testimony, that "employees have always

[16] While he briefly testified on other matters, Aldeano was not asked about, and consequently did not deny, Colón's testimony in this regard. (VII:390–396.) González likewise was not asked if he had ever made such a comment.

[17] A copy of 21 CFR § 110 was received into evidence as R. Exh.-18. The company rules were received into evidence as R. Exh.-4. Par. 5, on p. 2 of R. Exh.-4 prohibits employees, for safety and hygienic reasons, from wearing "rings, watches, neck chains or pendants, bracelets and other types of jewelry" on company premises.

been allowed to utilize their cellular telephones . . . in the cafeteria . . . and the patio," suggests that the Respondent's alleged ban on cell phone use did not apply to all areas inside and within the perimeter of the Respondent's facilities, as stated in the March 13 memo, and, indeed, as Jacobs himself initially testified.[18] (VIII:430.)

Like Jacobs, Bajandas testified that the Company's (GMP) policy on the wearing of jewelry such as earrings and watches, extends implicitly to cell phones and beepers, explaining in this regard that employees are not permitted to have "anything" on their persons that might jeopardize their safety. Bajandas, as previously indicated, further explained that the prohibition applies to employees and supervisors alike. Regarding the areas to which the cell phone ban applied, Bajandas undermined Lejardi's purported "reminder" to employees in the March 13 memo, that the ban applied to the inside of the plant and its perimeter, by testifying that the use of cell phones has occurred inside the plant, and that he himself has done so on occasions. Further, Bajandas' description of the cell phone restriction to Colon on March 10, 2000, e.g., that the ban applied to the production area, was also inconsistent with the March 13 memo's description of the policy as applying to the entire "plant and its perimeter." I have no doubt, given his statement to Colon about the ban applying to production areas, and his admission that cell phones have in the past been used inside the plant by himself and others, that Bajandas himself did not believe that, prior to March 13, the Respondent's purported ban on the use of cell phones extended to all areas inside, and around the perimeter, of Respondent's facilities, as was stated in the March 13 memo.[19] (VII:346–348; 378; 382.)

In sum, I found neither Jacobs' nor Bajandas' testimony concerning Respondent's policy on the use of cell phones by employees to be particularly credible. Both, as previously discussed, gave confusing, as well as conflicting and, at times, self-contradictory, descriptions of the Respondent's alleged cell phone policy and its parameters. Their testimonial description of the alleged ban was, moreover, inconsistent with the ban described in Lejardi's March 13 memo, an inconsistency left unexplained by Jacobs who, by his own admission, directed Lejardi to prepare and post the memo. Adding to the confusion is a May 17, 2001 memo issued by Lejardi to all employees at the Arroz Rico plant "reminding" them that the use of cell phones, beepers, and jewelry was prohibited in "the areas of production, mill, dispatch, and the elevators." (GC Exh.-38.) The restrictions on employee use of cell phones and beepers described by Lejardi in his May 17, 2001 memo, as noted, are different, e.g., less restrictive in that they are limited to specific areas of a plant, from that described by him in his earlier memo of March 13, 2000, which, as noted, extended the ban to the entire facility and its perimeter. This obvious discrepancy between the total ban on the use of cell phones described in the March 13, 2000 memo, and the less restrictive one subsequently described in the May 17, 2001 memo, was not explained by the Respondent. Lejardi, who authored both memos and who presumably could have clarified the matter, was never called to testify. The Respondent's failure to call Lejardi as a witness to explain the inconsistencies in his memos warrants an adverse inference that, if called, his testimony on this issue would have been adverse to Respondent. *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1154 at fn. 20 (1999).

Given the above facts and inconsistencies in Jacobs' and Bajandas' testimony, the Respondent's claim, that it had, prior to the March 10, 2000 incident and March 13, 2000 posting, long maintained an unwritten policy restricting employee use of cell phones in the workplace, is not a credible one.[20] However, assuming, arguendo, that the Respondent, prior to March 10, had some unwritten rule or policy restricting employee use of cell phones, it is patently clear from their own ambiguous and inconsistent testimony that neither Jacobs nor Bajandas knew precisely what those restrictions were. In any event, Colon's and Pino's credited testimony, that they were unaware of any prohibition on the employee use of cell phones inside the plants, and that they and/or other employees often used cell phones in the workplace without apparent repercussions, and Jacobs' admission that employees were never expressly told, during their training on the GMPs, of any restrictions on the use of cell phones, leads me to believe that if any such restriction did exist, they were never conveyed to employees and, moreover, had been either ignored or never enforced.

Discussion

The complaint alleges that the Respondent unilaterally and unlawfully changed its employees terms and conditions of employment on March 10, when Bajandas prevented Colon from using his cell phone, and on March 13, when Lejardi posted the memo informing employees that the use of cell phones was prohibited inside the plant and its perimeter.

[18] Jacobs did not explain why, if employees were allowed to use their cell phones in certain areas within the Respondent's facilities, the March 13 memo he directed Lejardi to prepare describes the ban as applying to all areas "inside the plant and its perimeter."

[19] At the hearing, Respondent's counsel, Robles, averred that the employees were told "from day one that they cannot use the cellular phones in the workplace" (IV:607). His assertion in this regard, however, lacks evidentiary support or corroboration from either Jacobs or Bajandas, neither of whom testified that employees were specifically informed of the ban. In fact, Jacobs, as noted, readily admitted that, during the employee training sessions on the GMPs, he never mentioned that cell phones and beepers were among the items considered banned under R. Exh.-4. Nor does Robles' description of the ban as applying to the "workplace" fully square with Bajandas' or Jacobs' description of the extent of the limitation on cell phone use, for as noted, Jacobs, at one point, described the ban as applying only when employees were actually operating machinery, while Bajandas explained that the ban applied to the production area in general, rather than to the entire plant.

[20] The only objective evidence produced by the Respondent suggesting the likelihood that it may have had some rule on the use of cell phones is a warning memo issued to Colon in November 1996, for not complying with a company rule on the wearing of safety glasses (see R. Exh.-6). The memo, in addition to identifying the "wearing of safety glasses" as a "safety norm," lists three other "safety norms," one of which is the "using or carrying a cellular or beeper inside the working area." Notwithstanding the reference in the memo to a safety rule regarding the use of cell phones or beepers, the Respondent readily admitted at the hearing that this memo by itself does not constitute a rule, and that, in fact, no written rule exists prohibiting such conduct (IV:606–607).

An employer has a statutory duty to bargain in good faith with the duly chosen representative of its employees regarding the latter's wages, hours and other terms and conditions of employment, commonly referred to as "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342 (1958). Absent a clear and unmistakable waiver, an employer violates the Act if it unilaterally alters or changes a term or condition of employment without first giving its employees' representative prior notice, and an opportunity to bargain over, said change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).[21]

The Respondent's sole defense to the allegation is that it has long maintained an unwritten rule prohibiting the use of cell phones inside its plants, and that Bajandas was simply enforcing that rule against Colon on March 10, while Lejardi, in his March 13 memo, did nothing more than "remind" employees of the purported rule.

I find no merit in Respondent's argument. Other than Jacobs' and Bajandas' confusing, vague, and at times conflicting testimony, the Respondent produced no evidence to show that it had, prior to March 10, 2000, maintained a policy prohibiting the use of cell phones in the workplace. By its own admission, the Respondent never actually had a written policy to that effect. If anything, Colon's and Pino's credited testimony, corroborated in part by both Jacobs and Bajandas, makes clear that the use of cell phones in the plant was a common and accepted practice among employees and supervisors alike. Their testimony in this regard, as well as Jacobs' admission that employees were never actually told, during their training on the GMPs, that the prohibition on the use of jewelry extended to cell phones and beepers, convinces me that any purported restrictions the Respondent may have had on the use of cell phones at the workplace, were never actually communicated to employees and, moreover, had either been ignored or never enforced. The Respondent in this regard produced no evidence to show that any employee had, prior to March 10, 2000, ever been spoken to, warned, or otherwise disciplined for violating its so-called ban on cell phone use in the workplace.

In short, I find, contrary to the Respondent's claim, that the employees' use of cell phones inside Respondent's facilities was a common and accepted practice prior to March 10, 2000, when Colon was prevented by Bajandas from using his cell phone, and certainly before the Respondent posted its purported March 13, 2000 memo. The use of cell phones by employees was therefore a term and condition of their employment, and thus a mandatory bargaining subject which the Respondent was not at liberty to unilaterally alter or change without first notifying the Union and affording it an opportunity to bargain. *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 122 (1997); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 315 NLRB 882, 895 (1994); *Treanor Moving & Storage Co.*, 311 NLRB 371, 386 (1993); *Brown & Connolly, Inc.*, 237 NLRB 271, 281 (1978); *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986).[22] The Respondent, however, did just that when, on March 10 and 13, 2000, respectively, and without prior notice to or bargaining with the Union, it prohibiting Colon from using his cell phone inside the plant to call the Union, and posted the memo informing employees of the ban on cell phone use inside the plant and its perimeter. Accordingly, the Respondent's above conduct amounted to violations of Section 8(a)(5) and (1) of the Act, as alleged.[23]

3. The new equipment training policy

The record reflects that the Respondent utilizes different types of machinery and equipment in its production process. One such machine, identified as an ICA, is used for packaging rice. In late 1998, early 1999, the Respondent acquired and installed two ICA machines, each of which required five–six employees per shift to operate. Jacobs testified that employees "were selected [for training] based on a group of employees with higher seniority to work together with employees with less seniority for both shifts" (VIII:436–437).[24] According to Jacobs, employees chosen to train and operate this equipment were those already classified as A-skilled. Jacobs further testified that the training given to employees on the ICA did not result in any promotion, salary increase, or additional benefits. (VIII:438).

In February 1999, the Union, through Figueroa, asked that two A-skilled mechanics, Antero Diaz and Francisco Martínez, be trained in the mechanical maintenance and repair of the ICAs. The Respondent, Jacobs claims, agreed to do so because both Diaz and Martínez apparently were receiving some form

[21] A union's waiver of its statutory right to bargain over a particular subject matter can occur by express language in a collective-bargaining agreement, or may be implied from the parties' bargaining history, past practice, or a combination of both. *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995); *The Register-Guard*, 301 NLRB 494, 496 (1991). The party claiming that a waiver has occurred bears the burden of showing that the union clearly and unmistakably relinquished its right to bargain over the subject matter. *TCI of New York*, 301 NLRB 822, 824 (1991); *Twin City Garage Door Co.*, 297 NLRB 119, 128 (1989).

[22] The Respondent does contend that the use of cell phones is not a mandatory bargaining subject. Rather, its sole argument, which I have rejected as lacking evidentiary support, is that it was simply adhering to an established past practice when it prohibited Colon from using his cell phone in the production area, and when it posted the March 13, 2000 memo. The Respondent, who bore the burden of proving that it had such a practice, has, as found above, not done so.

[23] The Respondent's further claim, that the allegation is time barred by Sec. 10(b) of the Act, is rejected as without merit. Sec. 10(b) of the Act provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Here, the credible evidence of record fails to show the existence of any rule prohibiting cell phone use in the workplace prior to March 10, 2000. That the Respondent may long have had "concerns" about the use of cell phones in the workplace, as it asserts on brief (R. Br. :57), does not establish that a ban on cell phone use had been in place prior to March 10, 2000. Further, even if some restrictions had been in place, the Respondent has not demonstrated that the Union was, or had reason to be, aware of such restrictions. *Paul Mueller Co.*, 337 NLRB 764 (2002); *Dutchess Overhead Doors, Inc.*, 337 NLRB 162 (2001).

[24] Jacobs' testimony in this regard was ambiguous and confusing. Thus, it is not clear if Jacobs was stating that the selection of employees for training on the ICA machines was to be done according to seniority and that these employees would then be put to work alongside less senior employees (possibly to train the latter), or whether he meant to say that senior and less senior employees would be trained together.

disability benefits. Jacobs denies discussing any other claim or matter during his 1999 meeting with Figueroa. (VIII:440–441.)

Early in 2000, the Respondent acquired and installed another new machine, known as a CSV-40, in the production department of the Arroz Rico facility which was to be used for the packaging of long grain rice. Jacobs testified that the selection procedure for employees training on the CSV-40 was the same as that followed in 1999 with the ICAs, e.g., senior as well as less senior A-skilled employees from different shifts were to be selected, and that the training would have no impact on the employees' opportunity for promotion, or affect their classification in any way. (VIII:441–442.)

Following installation of the CSV-40, Juarbe circulated a memo dated March 1, 2000, notifying production employees of the new machine, and asking that those interested in receiving training on the new equipment should obtain a questionnaire from Lejardi describing the skills that would be evaluated. The memo states that all those meeting the requirements would be considered for the training (GC Exh.-8). While the memo did not specify precisely what those requirements were, it rather vaguely suggests that the requirements needed were somehow based on the employees having "necessary skills." On March 3, 2000, 2 days later, Lejardi circulated another memo stating that no one had yet requested training on the CSV-40, and noting that they had only until March 7, 2000, to do so (GC Exh.-9).

On March 6, 2000, Figueroa wrote to Juarbe stating that the collective-bargaining agreement required the training on the CSV-40 to be done according to seniority, and reminded Juarbe that on February 5, 1999, when the Respondent first acquired its ICA machines, an agreement was entered into between Jacobs and Figueroa whereby training on the ICAs would be provided to employees with the most seniority (GC Exh.-10). By letter dated March 7, 2000, Juarbe responded to Figueroa's claim of a February 5, 1999 agreement by noting that, according to Jacobs, "there is no evidence of any agreement reached" on the subject of providing training by seniority. (GC Exh.-11.) Jacobs similarly testified that Figueroa was wrong in his assertion that an agreement was reached in 1999 requiring that training be provided on the basis of seniority. Rather, his recollection was that the February 1999 meeting involved only an agreement to train mechanics Diaz and Martínez on the maintenance and repair of the ICAs. (VIII:444.)

Figueroa responded 2 days later by letter stating that Juarbe was wrong, and that Jacobs was a liar and an unprofessional because an agreement had indeed been entered into on February 5, 1999, whereby Jacobs agreed that training on the ICAs would be done according to seniority. Figueroa also insisted that Juarbe had been present at the 1999 meeting when the agreement was made and was, therefore, lying about not knowing of the agreement. Figueroa reiterated that any training that was to be done on the ICAs or some other machinery must be done according to seniority. He then requested that the Respondent sit down and negotiate with the Union the procedure to be followed for providing such training (GC Exh.-13). Figueroa claims that the Respondent has refused to negotiate over employee training on the new equipment (I:89).

On March 8, 2000, Gonzalez wrote to Figueroa addressing the issue of further training of employees on the ICA machines, and on the new CSV-40 machine. Regarding the former, Gonzalez noted that while the training period and its training contract with the ICA machine manufacturer had ended, he nevertheless would, consistent with his policy that all employees possess the necessary skills and with the Union's request that employees not trained in 1998 and 1999 on the ICAs receive such training, permit all employees who had not taken the training to do so. The evaluation and training of these employees, according to Gonzalez, would follow the seniority list, and that the training of these employees would begin with the "simpler machines" and end up with "the more complex machines, the CVS-40."[25] Training, the letter stated, would begin by employees filling out a questionnaire specifying his or her areas of knowledge and the areas where training was needed. Finally, Gonzalez advises that the training in the new CSV-40 would be done in accordance with Juarbe's March 7 letter. Figueroa testified that an employee's failure to train on new machinery could adversely affect his or her job status. He explained that the collective-bargaining agreements require that employees classified as A skilled be familiar with all packing operations. Thus, he reasoned that an A-skilled employee unfamiliar with or not trained in new machinery, such as the ICAs or the CSV-40, could theoretically be downgraded to a lower classification, e.g., B skilled, as they would lack the skills needed to operate said machinery (I:93–94).

Discussion

The General Counsel contends that the selection process announced by the Respondent in March 2000, for employees wanting to be trained on the CSV-40 machine was done without giving the Union any prior notice or an opportunity to bargain over the process, in violation of Section 8(a)(5) and (1) of the Act. The Respondent argues that the allegation is barred by Section 10(b), and that, in any event, under article 1, section 1, of its collective-bargaining agreement with the Union, it had the right to unilaterally institute the March 1, 2000 training program.[26]

As to the Respondent's latter defense, there is no question, and the Respondent does not claim otherwise, that the training program on the new equipment announced on March 1, 2000, is a mandatory subject of bargaining, as it could potentially affect advancement opportunities for unit employees. *E.G. & G. Rocky Flats, Inc.*, 314 NLRB 489, 497 (1994); *Cello-Foil Products, Inc.*, 178 NLRB 676, 682 (1969). As such, absent a

[25] In the various correspondence received into evidence, the new equipment is at times described as either the CVS-40 or the CSV-40.

[26] Art. I, sec. 1 of the parties agreement reads as follows:

> The Union recognizes that it is the exclusive right of the COMPANY to conduct, manage, and/or operate the businesses, to establish and maintain in good operation of the work rules. Likewise, it recognizes that the right to control, supervise, and manage the COMPANY in general, are exclusive functions of the COMPANY. The creation of new jobs, the elimination or changes of existing jobs, the service to be provided and the scheduling of work, are the COMPANY'S prerogatives, and the same will not be considered as [excluding] other managerial prerogatives not previously explained in detail; except for the limitations stated in this Agreement.

clear and unmistakable waiver by the Union of its right to bargain over this particular subject matter, the Respondent was not free to unilaterally institute the training program without first giving the Union notice and an opportunity to bargain. The Respondent, however, contends, implicitly, that such a waiver can be found in the language of the management-rights clause which gives it the exclusive right "to conduct, manage and/or operate the business, establish and maintain the good operations of the work rules." (R. Br. 50.) I disagree, for it is well settled that the Board "will not infer, from a general contractual provision, that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" Stated otherwise, the waiver must be clear and unmistakable. *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992); *Register-Guard*, 301 NLRB 494. 495 (1991); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) Here, nothing in the language of article I, section 1, cited by the Respondent, or elsewhere in that provision for that matter, makes reference to, much less mentions, the right claimed by the Respondent to unilaterally institute training programs for employees. The clause, thus, lacks the degree of specificity required to constitute a clear and unmistakable waiver of the Union's right to bargain over this subject matter. Moreover, the Respondent, it should be noted, does not contend, nor is there any evidence to show, that this particular subject matter was discussed and explored during contract negotiations, or that its March 1, 2000 decision involving the institution of the training program was consistent with an established past practice. Accordingly, the Respondent's waiver defense is found to be without merit.

As to the Respondent's 10(b) defense, the latter provision, as noted, precludes the finding of an unfair labor practice based on conduct occurring more than 6 months prior to the filing of the unfair labor practice charge. Here, the allegation, that the Respondent's March 1, 2000 unilateral institution of a training policy was unlawful, is based on an unfair labor practice charge in Case 24–CB–8579 filed on March 15, 2000, clearly well within the 10(b) 6-month limitations period. (GC Exh.-1[c].) The Respondent's suggestion, on brief, that the Union is somehow precluded by Section 10(b) from challenging the legality of its March 1, 2000 conduct because it never filed a charge over, or challenged the legality of, the training program established for employees on the ICA machines in 1998, is without merit, for it is well settled that each failure or refusal by an employer to satisfy its bargaining obligation constitutes a new and independent violation of the Act. *U.S. Can Co.*, 305 NLRB 1127, 1143 (1992); *Washington Hardware &Furniture Co.*, 175 NLRB 63, 65 (1969); *Cumberland Shoe Corp.*, 156 NLRB 1130, 1137 (1966); also *Industrial Power*, 321 NLRB 816, 819 (1996). Thus, even accepting as true the Respondent's claim that the Union could have filed a charge in 1998, alleging its institution of an employee training program as unlawful, the Respondent's subsequent refusal to bargain over the March 1, 2000 institution of a training program for the CSV-40 amounted to a new and independent violation, for which a timely charged was filed.

Having rejected as without merit the Respondent's "waiver" and "10(b)" defenses, I find that the Respondent's failure and refusal to notify and bargain with the Union before announcing and instituting its March 1, 2000 CSV-40 training program for unit employees was unlawful and a violation of Section 8(a)(5) and (1) of the Act.

4. The refusal/failure to deduct union dues

Both collective-bargaining agreements entered into by the parties contain, at article XXV, a union-security provision requiring that unit employees become members of the Union 31 days after they begin their employment with the Respondent. Section 2 of article XXV requires that an employee sign a written authorization directing the Respondent to deduct union dues from the employee's salary, and requires the Respondent to comply with that authorization and to deliver the collected dues to the Union's treasurer.

On February 17, 2000, Figueroa wrote to Juarbe advising that four "maintenance employees"—Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz—were seeking membership in the Union and had submitted signed dues-checkoff forms to the Union authorizing the Respondent to begin deducting the required union dues from their wages. The signed dues-checkoff forms were attached to Figueroa's letter. (GC Exh.-7.) Figueroa claims that when these four employees came to him seeking membership in the Union, they described themselves as welders in the maintenance department who performed their work in the Amelia and Corujo plants. (I:63.)[27] It is undisputed that welders are among the job classifications that form part of the bargaining unit.

Figueroa testified that after sending his letter, Juarbe got back to him and indicated he was going to discuss the matter with González, and that Juarbe subsequently informed him that he had gotten González' approval and that the dues deductions would be made. Figueroa, however, claims that Juarbe called him a few days later to say that González had changed his mind and that no dues deductions would be made. (I:67.) He further claims Juarbe gave him no explanation as to why Gonzalez had changed his mind.

Juarbe had a different take on his conversation with Figueroa regarding these four employees. Thus, he recalls receiving Figueroa's February 17, 2000 letter. He testified that the four employees in question had been working for the Respondent since 1996 and were employed in the construction department at the Amelia plant, not in the maintenance department, as testified by Figueroa (VI:174). He claims that on receiving Figueroa's letter, he informed Figueroa he would look into the matter and then consulted with González. Gonzalez purportedly told him that he was not opposed to the four employees being part of the Union, but that the four would have to be included in a bargaining unit separate and apart from the production employ-

[27] Franco, Franco Villegas, Castro, and Ortiz have apparently been employed by Respondent for several years. Figueroa testified, without contradiction, that the Union had not previously sought to collect dues from these four individuals because he had been led to believe by González that the four were not employees but rather independent contractors. It was only when the four sought to become union members in February 2000 that Figueroa checked their pay stubs and learned that they in fact were employees, not subcontractors. (IX:666–667.) González did not refute Figueroa's above assertion. Figueroa's testimony in this regard is credited.

ees as they were construction employees. Juarbe then notified Figueroa of his discussion with González, and stated that the Union was allowed to represent the four employees but in a unit different from the one the Union already represented at Amelia, and advised Figueroa to take whatever steps were necessary before the Board to achieve this goal. Juarbe claims that during negotiations that took place in December 2001, the Union asked that Franco, Franco Villegas, Castro, and Ortiz be included in the Amelia production unit but that the Respondent declined to do so (VI:177–178). Juarbe concedes that the four employees performed welding work and were viewed by the Respondent as welders. He contends, however, that at no time since February 2000, when the Union submitted dues-checkoff authorization for the four employees, have these four employees been viewed by the Respondent as forming part of the bargaining unit (VII:266–267).

Figueroa expressly denied Juarbe's version of their discussion regarding the inclusion of the four employees in the unit, reiterating, on cross-examination, that Juarbe simply told him that Gonzalez had changed his mind without giving an explanation (II:227). Although questioned on other matters, Gonzalez was never asked to corroborate Juarbe's account, or to refute what Figueroa, through Juarbe, attributed to him. The failure to question Gonzalez on this issue, despite the fact that the latter, according to Juarbe, was the one who made the decision on whether or not dues should be deducted, supports an adverse inference. *Asarco, Inc.*, 316 NLRB 636, 640 (1995).

I credit Figueroa's version of his conversation with Juarbe. Juarbe was simply not very convincing on this issue. His claim, for example, that the Respondent has never treated or viewed these four employees as part of the bargaining unit is rendered suspect by a February 27, 2002 letter he sent to the Union advising it of a layoff of certain unit employees (see GC Exh.-37). The four individuals whose status is at issue here were included among the unit employees identified by Juarbe in his letter as those unit employees who be affected by the layoff (VII:263). The letter, thus, clearly undermines Juarbe's assertion that the Respondent has never viewed these employees as part of the unit. Juarbe's rather defensive and at times argumentative demeanor on cross-examination convinces me that he was being evasive and less than candid (see, e.g., VII:245; 258). Accordingly, I find, as testified to by Figueroa, that Gonzalez, through Juarbe, at first agreed to allow the deduction of dues for the four individuals, but subsequently, and without explanation, changed his mind and refused to do so.

As to the duties performed by these four employees, Geraldo Curet, their immediate supervisor, testified that all four have been with the Company for more than 8 years, and that they are assigned to the Respondent's construction department which is responsible for the construction and expansion of Respondent's buildings, warehouses, and other facilities. Curet claims that the four employees perform their functions throughout the Respondent's various facilities, and that their duties differ substantially from the work typically performed by bargaining unit welders in that the latter engage in what he described as "light" welding, whereas the former are more akin to "construction workers" who perform "structural" welding. According to Curet, there is no relationship between the work done by bargaining unit welders in the maintenance department and that done by the four construction department welders. He explained in this regard that while unit welders are responsible for the general maintenance of the plant, the construction department welders are exclusively engaged in the construction and building of new structures for the Company and perform no unit work at all. However, on occasion, construction department welders have installed new production equipment. Curet denies that the latter have ever performed light welding work to repair production equipment at the plant (VII:323). Curet admits that unit welders have on occasion assisted construction department welders, but that such work consisted of holding ropes or material or doing light welding work, and that such assistance occurs only about once or twice a year (VII:295–296; 301). Unit employees, Curet contends, do not perform "structural" or "heavy" welding when assisting construction department welders because they lack the skills to do so. (VII:314–315.) Like Juarbe, Curet was, at times, also evasive, as when he declined to provide a straight answer to the General Counsel's question regarding the duties performed by certain employees (see, e.g., VII:319).

Franco Mateo and Franco Villegas, both of whom no longer work for the Respondent, testified as to the work they performed while in the Respondent's employ. Franco Mateo testified that he worked as a welder at the Respondent's various plants repairing defective equipment, and working on expansions made to the facilities. Franco Mateo also identified bargaining unit employees Daniel Castro, Domingo Garcia, Jorge Ortiz, and William Jomez as having worked with him on construction projects undertaken by the Company (IX:618). He explained that at times, while working on a construction project, he, along with any of the other construction welders and/or unit welders, might be asked by the supervisor in charge to repair some machinery or equipment that needed fixing (IX:620–621). In short, Franco Mateo described the work he did while employed by Respondent as construction and maintenance work (IX:635).

Franco Villegas, brother of Franco Mateo, testified that he too was a welder who performed construction as well as maintenance or repair work at Respondent's various plants. The repair work described by Franco Villegas consisted of repairing tanks that had rusted out. Franco Villegas also identified Castro, Garcia, Ortiz, and Jomez as the "coworkers" who worked alongside him and his brother doing all types of welding work at the different plants. (IX:644.) Franco Villegas specifically recalled doing maintenance work on certain machinery at the Corujo plant with Jomez on instructions from either Curet or supervisor Augusto Montoya, and that such maintenance work included changing damaged screens, and repairing washers and elevators (IX:647). He further testified that he had also worked with Jomez and Garcia on the construction of tanks, and that while the work he did on such projects involved electrical welding, his duties in this regard consisted mostly of doing the pre-welding preparation, such as taking measurements, and that, "for the most part," he did not do much welding. Jomez and Garcia, he explained did the welding on such projects. (IX:648.)

Jomez, currently employed as a bargaining unit welder by the Respondent, testified, consistent with the testimony of Franco Mateo and Franco Villegas, that his duties include doing maintenance as well as structural welding. (IX:588.) He testified that when he first began working for Respondent, the four construction welders were presented to him as his "fellow welders." Jomez described the work performed by the four construction welders as being the same work that he performed (IX:592). According to Jomez, 95 percent of his worktime is spent doing structural welding work. (IX:608.)

Discussion

It is well established that the duty to bargain includes a duty to checkoff and remit union dues if there is a contractual basis for doing so. *Cherry Hill Textiles, Inc.*, 309 NLRB 268, 269 (1992). Article XXV of the parties' agreement clearly imposes such an obligation on the Respondent. The latter does not deny refusing to deduct union dues for Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz, but contends, on brief, that it was justified in doing so because these four employees do not share a community of interest with other production and maintenance employees. The Respondent's contention is without merit.

The Respondent's "community of interest" argument, in my view, is nothing more than a post hoc attempt to justify its refusal to comply with its contractual obligations. Support for this proposition can be found in the fact that in its answer to the complaint, the Respondent never asserted a lack of "community of interest" as a defense to this allegation, and instead claimed that it refused to discount union dues for these four individuals because the Union had not provided it with the "correspondent [dues checkoff] authorization." Its claim in this regard is specious at best, for the record evidence makes patently clear that Figueroa did, in fact, present Juarbe with properly signed dues-checkoff authorizations from all four employees on February 17, 2000, long before the Respondent filed its answer to the complaint. Further, it would appear from the Respondent's February 27, 2002 letter to the Union notifying it of an upcoming layoff of unit employees, which lists Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz as unit employees who would be affected by the layoff, and from the company identification cards given to them when first employed identifying them as "welders" in the "maintenance" department, that the Respondent, notwithstanding its claim to the contrary, has treated and viewed these four individuals as part of the bargaining unit. Finally, the evidence of record, and in particular the testimony of the various employees who testified regarding their respective duties, convinces me that Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz work side-by-side with, and perform basically the same work as, other unit welders, and thus share a community of interest with them.

Accordingly, the Respondent's claim that it was justified in refusing to deduct union dues from Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz because they purportedly lacked a community of interest with other unit employees is rejected as without merit. The Respondent's failure to comply with its contractual obligation to deduct the dues amounted to a refusal to bargain, and violated Section 8(a)(5) and (1) of the Act, as alleged.

5. The demotion/reclassification of employees

The record reflects that David Arroyo Pino, Javier Garcia, Rodolfo Rodriguez, and Luis Perez, all initially classified as A-skilled employees, worked on the production line operating what is known as a 20-pound rice-packing machine.[28] Operation of the 20-pound machine is a purely manual function requiring all four individuals to carry out a specific chore. Thus, the machine operator's duty is to manually fill bags with rice, which are then sent along a conveyor belt to a second employee some four to 5 feet away whose job it is to sew up the bags of rice. A third employee has responsibility for placing the sewn rice bags onto pallets, and a fourth employee has the quality control duty of ensuring that the bags have been sewn properly and to look for other production defects. The fourth employee also serves as a replacement whenever one of the other three employees has to leave the machine for some reason or another. These four employees would often rotate to the other stations so that each was able to perform all functions. The 20-pound bag machine and conveyor belt system apparently was capable of handling from six to seven bags at a time and generally produced approximately 45–50 pallets of rice per shift.

Jacobs testified that beginning sometime in March 2000 and continuing through the months of April and May 2000, he began noticing a decline in the level of production at the 20-pound machine. He explained that while the normal operation of the machine generally produces between 45–50 pallets per shift, the average number of pallets produced during these 3 months was between 20 and 25. Jacobs concluded from his observation of the four employees working on 20-pound machine, e.g., Pino, Garcia, Rodriguez, and Perez, that they were deliberately slowing down the production process and, thus, engaging in a work slowdown prohibited under article 8, section 1, of the parties' collective-bargaining agreement. To resolve the problem, Jacobs instituted a progressive disciplinary process for these four individuals consisting of verbal warnings, followed by written warnings, suspensions, and finally reclassification to a lower job status or classification (VIII:467–470).

The record reflects that in early May 2000, Garcia, Rodriguez, and Perez each received oral and written warnings advising that they were not meeting the production goal of processing six to seven 20-pound rice packs through the conveyor system at one time. Thus, on May 9, 2000, Garcia was notified in writing that he had previously been verbally warned that, while the production quota for the 20-pound machine was six to seven packs at a time on the conveyor belt, he was only producing five. The following day, May 10, he received a written warning for similar conduct and told that if his production level did not meet company and A-skilled employee requirements, he would be reclassified. On May 12, Garcia was notified in writing that effective May 15, 2000, he was being reclassified from A skilled to nonskilled due to his failure to meet production requirements. (See R. Exh.-2.)

[28] While described at the hearing as a 20-lb. machine, in actuality the machine packs rice in into 3-lb. bags of 20 each. (III:418.)

Perez received similar warnings on May 9 and 10, and was likewise warned on May 13, 2000, that his continued slowdown in production might result in his "suspension from employment or salary." (See GC Exhs.-31–33.) Perez was likewise downgraded or reclassified from A skilled to unskilled. Rodriguez received similar warning letters (R. Exh.-20), and shortly thereafter was discharged for reasons unrelated to his alleged low production.[29] Although no similar disciplinary warnings were produced for Rodriguez, Jacobs' testimony that he began "a process of progressive discipline . . . with these employees" suggests that Rodriguez might very well have been the recipient of such warnings (VIII:470).

Jacobs claims that the production levels at the 20-pound machine improved to their normal levels following the action taken against the four employees. It appears, and the Respondent does not contend otherwise, that the downgrading or reclassification of Garcia, Rodriguez, and Perez from A-skilled to the nonskilled job category, occurred without prior notification to the Union.

Discussion

The General Counsel contends that the downgrading or reclassification of unit employees is a mandatory bargaining subject, and that the Respondent's failure to notify and bargain with the Union before demoting or reclassifying Garcia, Rodriguez, and Perez from A skilled to unskilled violated Section 8(a)(5) and (1) of the Act.[30] The Respondent does not deny the General Counsel's claim that the reclassification of employees is a mandatory subject of bargaining. Rather, the Respondent, as it did with respect to its March 1, 2000 institution of the training program, argues only that it had the right to unilaterally downgrade or reclassify employees under the management rights clause, e.g., article, section 1, of the contract. Thus, it suggests implicitly that the language in the management-rights clause constitutes a waiver by the Union of its right to bargain over this subject matter.

The reclassification, demotion, or disciplining of employees Garcia, Rodriguez, and Perez is a mandatory subject of bargaining, as it relates directly to their wages, hours, and other terms and conditions of employment. *Artesia Ready Mix Concrete, Inc.*, 337 NLRB No. 93 (2002) (not reported in Board volumes); *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001); *Technicolor Government Services*, 268 NLRB 258, 261 (1983). The Respondent's assertion that the Union waived its right to bargain over this particular subject matter by agreeing to the management-rights clause in the contract is without merit, for the clause contains no specific mention of the Respondent's purported right to demote, downgrade, or reclassify employees from one job classification to another. The clause, as previously described, only recognizes the Respondent's general right to "control, supervise, and manage the COMPANY in general," and its specific right over "the creation of new jobs, the elimination or changes of existing jobs, the service to be provided and the scheduling of work." Clearly, the right to downgrade employees from one job classification to another is not among the specific rights listed in the latter part of the management-rights clause. Nor can one infer that said right was implicitly bestowed on the Respondent by virtue of the general right granted to it in article I, section 1, to "control, supervise, and manage" its operations, for, as previously noted, the Board will not infer a waiver of a statutory right from generally-worded language in a management-rights clause. Further, the Respondent does not contend, nor is there evidence to show, that this particular subject matter was discussed during negotiations, or that Respondent's decision to downgrade or reclassify Garcia, Rodriguez, and Perez was consistent with an established past practice. Accordingly, no evidence has been produced by the Respondent to show that the Union clearly and unmistakably waived its right to bargain over the reclassification of employees. The Respondent's unilateral decision to downgrade or reclassify Garcia, Rodriguez, and Perez from the A-skilled to the unskilled classification, without first notifying or bargaining with the Union, was, therefore, unlawful and a violation Section 8(a)(5) and (1) of the Act.

6. The change in Arroyo Pino's work schedule

Pino initially worked for the Respondent as a temporary employee at its Arroz Rico facility from 1992 through May 8, 1995. During those 3 years, Pino was first on the payroll of Pro-Tempo, and then on the payroll of Unique Search, both temporary employment agencies (III:440–441; GC Exh.-26; GC Exh.-27). Pino subsequently became a full-time employee of the Respondent. This conversion from temporary to permanent employment status occurred by virtue of a settlement agreement entered into between the Respondent and the Union on May 3, 1995, resolving an arbitration dispute, whereby Pino and a number of other temporary employees, including Geraldo Reyes, Santos Martinez, and Angel Nieves, became regular employees of the Respondent effective May 8, 1995 (GC Exh.-25).[31]

Pino remained a regular employee of the Respondent until terminated sometime in July 2000. He testified that during his employment, he operated the 20-pound machine as an A-skilled employee. Sometime in March 2000, Pino, together with his other coworkers on the 20-pound machine, e.g., Garcia, Rodriguez, and Perez, were moved from the first shift to the second shift. According to Pino, he was told that the reason for the shift change was because the Respondent was in the process of installing new machinery, and that the facility would not have sufficient power to run all the machines at one time on the same shift, leading to the shutdown of the 20-pound machine, and the transfer of its operators to the second shift (III:431; 513–514). Pino acknowledged that when the shift change occurred, the 20-pound machine was not operational (IV:510.)

Plant Manager Jacobs testified that Pino's and the other employees' shift was changed because the Respondent had instituted "two new brands" which increased production. He claims

[29] Rodriguez was apparently terminated for threatening Gonzalez (VIII:480). His discharge is not alleged in this case to be unlawful.

[30] For reasons unknown, the General Counsel withdrew Pino's name from this particular allegation.

[31] A list with the names of the temporary employees and the amount of seniority time applied to them is contained in an attachment to the May 8, 1995 agreement. The amount of seniority attributed to them, according to language in the agreement, was to be used solely for layoff and recall purposes.

that this increase in production capacity did not allow for the operation of three packing machines at one time on the same shift. He explained that the plant has a maximum production capacity of 30 tons per hour and that operation of the three packing machines used in production, e.g., the ICA, a 60-pound machine, and the 20-pound machine, would result in a 48–50 ton per hour production rate, thereby exceeding its maximum capacity. To enable it to maintain its 30 tons per hour production capacity, the Respondent opted to move operation of the 20-pound machine, which is the last one in the production chain, along with its operational crew, to the second shift. As a result, the 20-pound machine, Jacobs claims, is "practically never" used on the first shift. (VIII:453; 463.)

Following his transfer to the second shift, Pino protested, through Union Steward David Torres, to Supervisor Lejardi, that he had greater seniority than others who purportedly stayed on the first shift, namely Reyes, Martinez, and Nieves, and that under the Arroz Rico bargaining agreement, employees having the most seniority were entitled to work the first shift, which he claims was the preferred one, if they so desired. (III:433–434; 437.)

Discussion

The General Counsel contends that the reassignment of Pino from the first to the second shift was a mandatory subject of bargaining, and that the Respondent's unilateral decision to change Pino's shift without notifying the Union or affording an opportunity to bargain, was unlawful and a violation of the Act. The Respondent does not deny unilaterally changing Pino's work shift, or that such a change is a mandatory bargaining subject. It contends, however, that the right accorded it under article 1, section 1, the management-rights clause, to "schedule the work" of employees and to generally operate the business, justified its unilateral decision to move Pino from the first to second shift. (R. Br. 78.) Thus, it implicitly argues that the Union's agreement to such language in the management-rights clause was tantamount to a waiver by the Union of its right to bargain over any decision involving employee shift changes. I find merit in the Respondent's argument.

As previously described, the management-rights clause reserves exclusively to the Respondent the following rights: "the elimination or changes of existing jobs . . . and the scheduling of work." While the clause makes no specific mention of a right to change an employee's shift, the exclusive right accorded therein to the Respondent over the "scheduling of work" for employees, in my view, logically encompasses the exclusive right to unilaterally assign employees to different shifts. Clearly, the movement of an employee from one shift to another of necessity involves a change in that employees work schedule. Thus, I find that the Union's right to bargain over a decision to move an employee from one shift to another was clearly and unmistakably waived by the Union when it agreed to the "scheduling of work" language in the management-rights clause. The Respondent's March 2000 decision, therefore, to move Pino from the first to the second shift was, I further find, consistent with the prerogative granted to it under the "scheduling of work" language of the management-rights clause and not unlawful. Accordingly, I shall recommend that this particular allegation be dismissed.

7. The $500 bonus

The collective-bargaining agreement entered into by the parties in 1998 covering employees at the Amelia plant (GC Exh.-3) included, in appendix B, a provision whereby the Respondent agreed to pay each unit employee a bonus of $500 a year in exchange for the elimination of certain benefits that had been provided under articles VIII and X of the prior agreement.[32] Under appendix B, the Respondent was to pay employees the above amount on March 4 of the years 1998–2000, with an additional payment to be made on June 5, 1998.[33] The record, more particularly Figueroa's testimony, makes clear that the Respondent did in fact comply with the above-payment schedule. (II:192.) The Respondent made no further payments after the contract expired in 2000.

Figueroa claims that sometime in October 2000, during the early stages of negotiations, he sent Respondent a letter setting forth the changes the Union wanted to make to provisions in the expired contract. One such change, he contends, included a proposal to raise the amount of the bonuses set forth in appendix B from $500 to $1000 (I:104; GC Exh.-13). According to Figueroa, during the negotiations, the parties agreed to retain the bonus program described in appendix B at $500. He contends, however, that despite reaching such an understanding, the Respondent refused to sign the agreement (I:113; II:187).

Regarding the adoption of appendix B during the 1998 negotiations, González testified that during those talks, he proposed, and the Union agreed, to pay employees $2000 in four installments in exchange for the elimination of certain benefits provisions in the previous contract. He explained that once the last payment was made in March 2000, no further payments were made because the Respondent had complied with all the payments called for by appendix B. González contends that during the November 2000 negotiations, Figueroa initially insisted that the $500 bonuses were required to continue after expiration of the contract, but that the latter subsequently agreed with the Respondent's position and notified union members that the bonuses called for under appendix B were not required to be paid beyond 2000, and that if employees wanted the bonuses to continue, the matter would have to be renegotiated (VII:519). González was never asked to confirm or deny Figueroa's claim that the parties reached agreement during the negotiations to continue the bonus program beyond 2000. Nor, for that matter, was Figueroa asked during his rebuttal testimony to refute the

[32] The provisions of the old contract replaced by app. B included a "perfect attendance" and "sick leave" provision. Figueroa explained that under the old contract's "perfect attendance" provision, employees received $50 a month for every month in which they did not miss a day of work, and under the "sick leave" provision, employees could miss up to 6 days for personal matters without affecting a bimonthly bonus of $50 they purportedly received. (I:101.)

[33] During questioning by Respondent's counsel, Figueroa stated that under app. B, the $500 bonus was also to be paid in 2001 (II:193.) Respondent's counsel appeared to be in agreement with Figueroa regarding the 2001 bonus payment (II:196, L. 22). App. B, however, makes no mention whatsoever of any payments having to be made in 2001.

statements attributed to him by González during the November 2000 negotiations.

The only other testimony addressing the question of whether the $500 bonuses specified in appendix B of the 1998 contract were to continue beyond the year 2000, came from Union Delegate Ivan Vazquez. Vazquez, who served on the negotiating committee, expressed the view that the last payment that was to be made under appendix B was to occur on March 4, 2000. However, on further examination by the General Counsel, Vazquez stated that he understood the agreement between the parties to be that the $500-bonu payments were to be paid every year on March 4. ((VI:22–25.) Vazquez' testimony in this regard was too confusing and ambiguous to be entitled to any weight.

Discussion

The General Counsel contends that the Respondent's discontinuance of the $500. bonus amounted to unilateral change in the unit employees' term and conditions of employment and a violation of Section 8(a)(5) and (1) of the Act. He asserts that the language of appendix B contains "clear, specific and unequivocal language" stating that the bonus was to be paid to union members on an annual basis. Further, while acknowledging that appendix B sets forth specific dates when such payments were to be made, the General Counsel nevertheless argues that the bonus was a mandatory subject of bargaining which, under Board law, survives the expiration of the contract and must be continued until the parties either reach a new agreement or an impasse in bargaining. The Respondent counters that its obligation under appendix B was limited to making the $500 bonus payments on the dates specified only during the 3-year term of the agreement, and denies that the bonus payments were intended to continue after the contract expired. I agree with the General Counsel.

It is well settled that, with some limited exceptions not applicable here, the terms and conditions of employment established in a collective-bargaining agreement generally survive the contract's expiration and cannot be changed absent agreement by the parties or a bargaining impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); also *Quality House of Graphics*, 336 NLRB 497 (2001); *Mining Specialists, Inc.*, 330 NLRB 99, 105 (1999); *Coalite, Inc.*, 278 NLRB 293, 301 (1986). The Respondent does not contend, nor is there any evidence to show, that either requirement was satisfied here. Rather, its sole argument, as noted, is that appendix B, by its very terms, limited the payment of the $500 bonuses to just the 3 years covered by Amelia contract. I find no such limitation in appendix B. While appendix B does set forth the precise amounts and dates on which the bonuses were to be paid out during each year of the 1998–2000 Amelia contract, I find nothing in the wording of appendix B to reflect an agreement by the parties that the distribution of the bonuses would not continue once the contract expired in 2000. In fact, the first sentence of appendix B, which states that the Company agrees to pay each unionized employee a bonus of $500 a year, could very well be read to mean that the bonus payments were intended to be an ongoing proposition and not necessarily limited to the 3 years covered by the contract. In short, I find nothing in appendix B that can reasonably be construed as an agreement between the parties relieving the Respondent of its statutory obligation to continue this term and condition of employment once the contract expired. See *Mining Specialists, Inc.*, supra. Accordingly, by unilaterally discontinuing and failing to maintain in effect the $500 bonus program established under appendix B of its 1998–2000 collective-bargaining agreement with the Union, the Respondent, I find, violated Section 8(a)(5) and (1) of the Act, as alleged.

8. The alleged performance of bargaining unit work by nonunit employees

a. Complaint paragraph 10(g)

The complaint alleges several instances in which the Respondent purportedly used nonunit personnel to perform bargaining unit work, or used employees of one bargaining unit to perform work generally performed by employees of another unit.

Specifically, complaint paragraph 10(g) alleges that sometime in August 2000, the Respondent utilized temporary or administrative employees employed at the "La Zorra" warehouse to perform maintenance work at the Arroz Rico facility generally performed by unit B employees.[34] In support of this allegation, José Colón, a unit B employee at the Arroz Rico plant, testified that in August 2000, he observed La Zorra employee, Polinar Alvarado, whom he described as being either a temporary or an administrative employee at La Zorra, loading and unloading material and doing mechanical work at La Zorra, using equipment regularly used by unit B employees.[35] Alvarado, he explained, continued to perform the above-described unit work into either 2001 or 2002, and stopped doing so only after being injured and going on disability or workman's compensation (IV:578). Unit employee Francisco Aponte, employed as a grain elevator operator (known as Silo 12) at the Arroz Rico plant, also recalls seeing Alvarado in August 2001 loading and unloading trucks, and cleaning the area of the grain elevator, work described by Aponte as bargaining unit work. He last saw Alvarado doing such work towards the end of 2001 (V:687–688).

The Respondent offered no evidence to refute Colón's and Aponte's claim that Alvarado performed bargaining unit work during the period stated by the latter, or their claim that Alvarado was a nonunit employee at the time he performed such work.

Discussion

The complaint alleges, the General Counsel contends, and the Respondent denies, that the performance of bargaining unit work by Alvarado, a nonunit employee, violated the Act. I agree with the General Counsel.

[34] Although the complaint alleged that the "La Zorra" employees were part of a separate bargaining unit, the record shows, and the General Counsel on brief agrees, that said employees were temporary or administrative employees and not part of any established unit. (GC Br. 34). The General Counsel's unopposed motion to amend the complaint to correct the wording of par. 10(g), to reflect that "La Zorra" employees were "nonunit" employees, is granted.

[35] The Respondent admits that Polinar was a temporary employee employed at La Zorra and not part of the bargaining unit (IV:623–624).

The Board has held that an employer violates Section 8(a)(5) and (1) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative. *Harris-Teeter Super Markets, Inc.*, 307 NLRB 1075 at fn. 1 (1992), citing *Kohler Co.*, 292 NLRB 716, 720 (1989); *A-1 Fire Protection, Inc.*, 273 NLRB 964, 966 (1984). The assignment of unit work to nonunit employees, the Board has explained, affects the unit employees' terms and conditions of employment, as it has the potential to affect the scope of the bargaining unit. *Antelope Valley Press*, 311 NLRB 459, 460–461 (1993). Such an assignment of unit work to nonunit employees, as occurred here, was, therefore, a mandatory subject of bargaining which the Respondent was not free, absent a clear an unmistakable waiver by the Union of its right to bargain over the matter, to unilaterally make said work assignment without giving the Union prior notice and an opportunity to bargain.

The Respondent does not dispute that the assignment of unit work to nonunit employees is a mandatory subject of bargaining. Rather, in what appears to be a waiver defense, the Respondent, on brief, makes reference to two contract provisions—article XI, section 4 and article XXI, section 4—which it contends allows it to assign unit work to nonunit employees. Regarding article XI, section 4, that provision prohibits the Respondent from assigning unit work to supervisors and administrative employees while there are unit employees on layoff status, and from taking overtime work away from unit employees. While the provision makes no mention whatsoever of any right by the Respondent to assign unit work to nonunit employees (e.g., to supervisors and administrative employees), the Respondent's further assertion on brief—that the General Counsel had not shown that there were any unit employees on layoff when Alvarado was observed performing unit work—boils down to a claim that the ban in article XI, section 1, on the performance of unit work by nonunit employees while unit employees are laid off, should be read as implicitly authorizing the assignment of unit work to nonunit employees during nonlayoff periods.

The Respondent makes a similar argument with respect to article XXI, section 4, which permits the Respondent to employ temporary employees indefinitely provided they do not take work away from permanent employees.[36] This provision, like article XI, section 4, contains no mention of any purported right by the Respondent to assign unit work to temporary employees. However, the Respondent's assertion on brief, that the General Counsel produced no evidence to show that the unit work performed by Alvarado or any other temporary employee had the "negative effect of taking away work opportunities [from] unit employees," suggests that it has the implicit right under article XXI, section 4 to assign unit work to temporary employees so long as such assignments do not result in a loss of work opportunities for unit employees. (R. Br. 87–88).

The Respondent's reliance on articles XI and XXI to support its waiver defense is without merit for, to prevail on such a defense, the Respondent, as discussed in footnote 21, supra, must show that the subject matter at issue was expressly waived by the Union in the contract or, in the absence of such specific language, that the matter was waived during recent contract negotiations or via an established past practice. Here, neither article XI nor article XXI contains any specific reference to or mention of the Respondent's purported right to assign bargaining unit work to nonunit employees. Article XI, section 4, as noted, serves only to prohibit the Respondent from assigning unit work to nonunit employees during layoffs, but does not expressly authorize the assignment of such work during nonlayoff periods.[37] Article XXI, section 4 similarly recognizes the Respondent's right to use temporary employees provided they do not take work away from unit employees, but does not expressly grant the Respondent the right to assign unit work to temporary employees when such assignments might theoretically not cause a diminution in work opportunities for unit employees.[38]

Further, the Respondent does not contend, nor, for that matter, is there any record evidence to show, that the subject of the assignment of unit work to such nonunit employees as supervisors, administrative, or temporary employees was ever discussed or explored during their contract negotiations, or that the performance of unit work by nonunit employees was consistent with an established past practice. In these circumstances, I find that the Respondent has not met its burden of showing that the Union clearly and unmistakably waived its right to receive notice of, and to be afforded an opportunity to bargain over, the Respondent's assignment of unit work to nonunit employees. Accordingly, the Respondent's failure to do so with respect to Alvarado's performance of unit work violated Section 8(a)(5) and (1) of the Act.

b. Complaint paragraph 10(h)

Aponte also testified, in support of the allegation in complaint paragraph 10(h), that in August 2000, he observed unit A employees Vicente Martínez, Angel Medina, and Alberto Ortiz doing unit B work at Silo 12.[39] Specifically, he claims to have observed on many occasions Martínez loading trucks and cleaning the area around Silo 12, and that he last saw him doing

[36] See, GC Exh.-2, art. XI, sec. 4; art. XXI, sec. 4. No translation of these provisions was provided by either party at the hearing. However, the Respondent, on brief (R. Br. 86), has provided a fairly accurate translation of art. XI, sec. 4, and a somewhat accurate partial translation of art. XXI, sec. 4.

[37] Indeed, it would, in my view, have been highly anomalous for the Union to have included a prohibition in the contract against the Respondent assigning unit work to nonunit employees during layoff periods but to have allowed such assignments during nonlayoff periods.

[38] The Respondent's assertions regarding the General Counsel's failure to show, with respect to art. XI, sec. 4, that unit employees were on layoff, and, with respect to art. XXI, sec. 4, that unit employees were deprived of work opportunities by the assignment of unit work to nonunit employees, appears to be nothing more than an attempt to shift the burden of proof regarding its waiver defense to the General Counsel. As noted, the burden of proving a waiver of a statutory right rests squarely with the party asserting said defense. *TCI of New York*, supra.

[39] The Respondent operates 12 silos in all. Curet testified, without contradiction, that Silos 1–11 are generally used to store rice, while Silo 12, since 1998, has been used to store corn. (VII:324.)

this work towards the end of 2001. Aponte recalls that another grain elevator operator, Juan Garcia, was with him when he first observed Martínez doing unit B work in August 2000.

Discussion

The General Counsel contends that the work at Silo 12 was unit B work, and that by transferring unit A employees from the Amelia facility to Silo 12 to do work belonging to unit B employees, the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent disputes the General Counsel's claim that the work at Silo 12 is unit B work. Rather, it contends that Silo 12, which, as noted, is used to store corn, is an integral part of its grain feed operation run out of the Amelia facility. Thus, it insists that Silo 12 "serves exclusively to provide raw material to the Amelia and Corujo animal feed operations" and that the work there consequently belongs to unit A and not unit B (R. Br. 89–90).

I agree with the General Counsel. The merits of this particular allegation hinge on whether the work at Silo 12 was unit A or unit B work. Aponte, as noted, testified that the Silo 12 work has long been performed by unit B employees, and that he saw employees Martinez, Medina, and Ortiz, whom he described, as unit A employees, doing unit work at Silo 12 during 2000 and 2001. The Respondent has offered no evidence to contradict Aponte's claim of seeing Martinez, Medina, and Ortiz working at Silo 12, or his assertion that all three are members of unit A. Nor, for that matter, has it presented any evidence to dispute Aponte's claim that the work at Silo 12 was unit B work. The Respondent, instead, cites certain testimony by Curet that Silo 12 has always been used to store corn, and points out that Aponte himself testified in similar fashion. It insists that given the purpose of Silo 12, e.g., to store corn to be use in connection with the processing of animal feed at the Amelia facility where unit A employees work, it follows that the work at Silo 12 must have been unit A, not unit B, work. Its assertion in this regard, however, is based not any record evidence but rather on speculation and conjecture. The mere fact that corn is stored in Silo 12, and that it is used in connection with the processing of grain feed at the Amelia facility, in my view, does not, without more, constitute proof that the work done at Silo 12, was unit A work. Curet, it should be noted, never actually refuted Aponte's testimony that the Silo 12 work was generally done by unit B employees. Rather, Curet testified only as to Silo's 12 purpose and function, and was never questioned on which group of employees, unit A or unit B, regularly worked at Silo 12.

Accordingly, I credit Aponte and find that the Silo 12, work was unit B work, and that during 2000 and 2001, the Respondent assigned unit A employees to perform work in Silo 12 generally performed by unit B employees. Thus, I agree with the General Counsel and, for reasons discussed above in connection with the allegation in complaint paragraph 10(g), find that such an assignment of unit work to nonunit employees constituted a further violation of Section 8(a)(5) and (1) of the Act.

c. Complaint paragraphs 10(i)–(j)

Colón further testified, in support of the complaint allegation in paragraph 10(i), that in November 2000, he observed two nonunit administrative employees, Luis Negrón and Hernan Sáenz, whom he described as "checkers," operating forklifts, which work, he claims, was bargaining unit work. Colón described "checkers" as nonunit employees who regularly work in the dispatch area and are responsible for directing the forklift operators as to the material or cargo that is to be loaded onto trailers. Colón contends that as of the date of the hearing, Negrón and Sáenz were still performing the unit work of operating the forklifts.

Regarding complaint allegation 10(j), Colón testified that he observed Sáenz and temporary employee Norberto Butter in November 2000, doing bargaining unit work in the dispatch area adjacent to his own work area in the Arroz Rico facility (IV:581). He claims that both had been employed in the ALCA warehouse as either a temporary or administrative employee, although he admitted on cross-examination that he did not know precisely what positions these two held at ALCA (IV:635). However, he recalls that during the period in question, Butter was "occupying the unionized position in charge of vans," while Sáenz was "performing checker duties."(IV:581.)

Discussion

The General Counsel contends that the assignment of unit work to nonunit employees Butter and Saenz violated Section 8(a)(5) and (1). The Respondent's position regarding these allegations is the same as that asserted in connection with its defense to complaint paragraph 10(g), to wit, that the General Counsel produced no evidence to show that such work assignments "was contrary and/or proscribed by the collective-bargaining agreement applicable to the Arroz Rico production and maintenance employees" (R. Br. 88). I agree with the General Counsel and find, for the reasons discussed in connection with complaint paragraph 10(g), that the Respondent's unilateral assignment of unit work to nonunit employees Butter and Saenz in November 2000 violated Section 8(a)(5) and (1) of the Act.

d. Complaint paragraph 10(k)

Finally, Colon and Aponte both testified to seeing production supervisors doing bargaining unit work. Thus, Colón claims that in August 2000, he observed supervisor Luis Rivera operating ICA machine 3, and saw supervisor José Ramirez operating a forklift in the mill area of the plant. As to Rivera, Colón recalls that Rivera operated the ICA 3 machine for an entire shift (2 –10 p.m.) because the person who normally operated the machine did not report for work that day. As to Ramirez, Colon claims he observed him operating a forklift for some 10–20 minutes engaging in what he described as a "big bag movement," which, according to Colon, is typically performed by unit personnel (IV:641). Colon's testimony as to what he observed Supervisors Rivera and Ramirez doing was uncontradicted and is therefore credited.

Aponte's testimony on the other hand, while also uncontradicted, nevertheless was not very convincing. He testified to having seen Rivera on just one occasion standing next to the ICA 2 machine as he went to get a drink of water. Although he initially stated that his observation of Rivera standing in front of the ICA 2 machine lasted just a few seconds, he subsequently stated, somewhat inconsistently, that Rivera in fact

stayed in front of the machine the entire shift (V:699;704). I find Aponte's claim that he observed Rivera in front of the machine during the entire shift not to be credible. Rather, I find his former claim, that he saw Rivera standing in front of the ICA 2 machine during the few seconds it took for him to get some water, to be more believable. Aponte also claims to have seen Supervisor Eduardo Aldeano on two separate occasions standing near the ICA 1 machine, and asserts that his observations in this regard again occurred as he was on his way to get a drink of water.[40] These incidents, according to Aponte, occurred in August 2000.

Aponte readily admitted having no familiarity with the ICA 1 and 2 machines, raising a question as to how he would have known if Rivera and/or Aldeano were indeed operating the machines in question. That Aponte, by his own admission, only witnessed Rivera and Aldeano simply standing in front of or next to the machines adds further uncertainty to the question of whether either of these supervisors was indeed running the ICA machine. (V:704.) In these circumstances, I find Aponte's testimony as to what he observed supervisors Rivera and Aldeano doing simply too tenuous and vague to support a claim that the latter were operating the ICA machines sometime in August 2000, and, thus, possibly engaged in performing bargaining unit work.

Aponte also testified to seeing another supervisor, Leonardo Martin, in August 2000, operating a 20-pound machine for several minutes, and Supervisor Jose Ramirez sewing the bags of rice coming off the 20-pound machines and repairing a sewing machine. Ramirez, Aponte claims, performed this work during the entire 15 minutes that he, Aponte, was on break (V:709). According to Aponte, there were two other unit employees working on the 20-pound machine while Ramirez did the sewing and repairs. Given Aponte's dubious testimony as to what he observed with respect to Supervisors Rivera and Aldeano, I remain skeptical of what Aponte actually saw Supervisors Martin and Ramirez doing. Thus, the fact that he may have observed Martin operating the 20-pound machine for a few minutes hardly serves to establish that Martin was in fact performing bargaining unit work. It is quite possible, for example, that Ramirez may only have been testing or troubleshooting the machine. Nor do I find plausible Aponte's claim that he spent his 15-minute break watching Supervisor Ramirez sewing rice bags on the 20-pound machine.

Discussion

The General Counsel contends the unit work performed by the above-described supervisors violated Section 8(a)(5) and (1) of the Act. I find merit in the allegation but only with respect to the work that Colon observed Rivera and Ramirez doing in August 2000, to wit, the former operating the ICA machine 3 during an entire shift, the latter, Ramirez, operating a forklift to perform a "big bag movement." This evidence, as noted, was not challenged by the Respondent. Rather, the Respondent's sole defense to this conduct, identical to that raised with respect to the allegation in complaint paragraph 10(g), is that the performance of unit work by supervisors under article XI, section 4 is prohibited only when unit employees are laid off and, by implication, not on other occasions, such as during nonlayoff periods. For reasons discussed in my findings regarding complaint paragraph 10(g), the Respondent's argument, that the performance of unit work by Supervisors Rivera and Ramirez in August 2000, was not unlawful, is found to be without merit. I further find, therefore, that the Respondent violated Section 8(a)(5) and (1) when, without giving the Union notice or an opportunity to bargain, it allowed Rivera and Ramirez in August 2000 to perform bargaining unit work. The other alleged instances described by Aponte, of supervisors purportedly engaging in bargaining unit work, are simply too vague and tenuous to support a violation. I shall, therefore, recommend dismissal of these latter allegations.

9. The alleged failure to provide the Union with relevant information

The record reflects that on or about June 4, 1997, the Union was recognized by the Respondent as the exclusive bargaining representative of all "drivers and helpers" used at the Arroz Rico and Amelia facilities.[41] (GC Exh.-22.) On August 16, 2000, Figueroa wrote to Respondent's attorney, Robles, requesting certain information relating to the drivers' unit, which information, Figueroa pointed out in the letter, was needed by the Union in furtherance of ongoing contract negotiations it was having with the Respondent (GC Exh.-23).[42] Figueroa testified, without contradiction, that the Respondent never answered its August 16, 2000 letter. On September 8, 2000, Figueroa again wrote to Robles that he had not yet received a response or the information requested in his August 16 letter, and cautioning that the Respondent's refusal to reply within 5 days would be viewed by the Union as a refusal to bargain (GC Exh.-24). Figueroa testified that, to date, the Respondent has not complied with its information request (II:187).

Discussion

The complaint alleges, and the General Counsel contends, that the Respondent never complied with the Union's information request, and that its failure and refusal to do so violated Section 8(a)(5) and (1) of the Act. The Respondent, in its an-

[40] Although Aponte initially stated that both Rivera and Aldeano were operating the ICA machines, he subsequently admitted that he only observed the two supervisors standing in front of, and not necessarily operating, the machines.

[41] The unit appears to be the one described in the complaint as unit C, which includes:

> All chauffeurs and chauffeurs helpers employed by the Respondent at its facilities in Amelia Industrial Park, and Bo. Sabana rice plant in Guaynabo, and Corujo in Bayamon, but excluding all other employees, guards, and supervisors as defined by the Act.

[42] In its request, the Union asked to be provided with the following information: (1) Whether the Respondent had sold the trucks presumably driven by its drivers; (2) if so, to whom they were sold, the selling price, whether and what type of financing was provided; (3) if the trucks were sold to unit employees, why the Union was not notified of the sale and why the sale was not negotiated with the Union; (4) why drivers' unit employees were transferred to the production and maintenance unit without notifying or bargaining with the Union; (5) the number of employees remaining in the drivers' unit, their duties, and the types of trucks, if any, they are driving; and (6) whether there is any truck being driven by a unionized employee who is not part of the drivers' unit.

swer, denied the above allegation and claimed, instead, that the information requested by the Union in its August 16, 2000 letter had already been provided. The Respondent's posttrial brief, however, is silent on this issue. I find merit in the complaint allegation.

An employer has a statutory obligation to provide, on request, relevant information that might be needed by a union for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). When the information sought by a union pertains to the terms and conditions of employment of employees within the bargaining unit it represents, the information is deemed to be presumptively relevant to the union's proper performance of its bargaining obligations. *Watkins Contracting, Inc.*, 335 NLRB 222 (2001). Where the information sought is presumptively relevant, the employer has the burden of proving lack of relevance. *Hofstra University*, 324 NLRB 557 (1997).

The Respondent here has not questioned the the relevancy of the information sought by the Union in its August 16, 2000 request. Indeed, as stated, its sole defense, set forth in its answer, is that it has already complied with the request. Accordingly, I find that the information requested by the Union was indeed relevant. *Watkins Contracting*, supra. As to its claim that the information has already been provided, Figueroa testified under oath to the contrary. The Respondent, for its part, offered no testimonial or documentary evidence to refute Figueroa's claim, or to demonstrate that it has in fact complied with the Union's information request. Accordingly, I credit Figueroa and find that the Respondent has yet to furnish the Union with the information requested in its August 16, 2000 letter. Its failure to do so, therefore, constituted a violation of Section 8(a)(5) and (1) of the Act, as alleged.

10. The alleged March 20, 2000 comments by Supervisor Aldeano

Pino testified that on or around March 20, 2000, following a meeting held between Supervisor Aldeano and those employees who worked on the 20-pound machine, Aldeano told employees that they should do what Michael Martinez, a former employee turned supervisor, had done, to wit, "turned his back entirely on the Union and give his support to the Company." Aldeano, Pino claims, stated that employees stood to gain by doing so, and that if they filed a charge with the Board, employees would either lose or it would take several years to resolve because "Gonzalez had money to pay." Pino testified that employees present at this meeting included Felipe Ramos, Luis Perez, Javier Garcia, and Rodolfo Rodriguez. (III:421–422.) Perez provided some corroboration for Pino's testimony. Thus, he testified that Aldeano told him and other employees sometime in April 2000, that they should do what Martinez had done and change sides and leave the Union. (IV:670.)

Aldeano generally denied making any antiunion remarks to any employee. (VII:392.) His denial in this regard, prompted by leading questions from Respondent's counsel, was not credible. Rather, I found Pino and Perez to be more believable and accept as true their claim that Aldeano suggested that they abandon the Union. I also find credible Pino's assertion that Aldeano told them it would be futile to file any charges with the Board because they would lose, or because Gonzalez had enough money to delay the matter for years.

Discussion

The complaint alleges that Aldeano's remarks were coercive and a violation of Section 8(a)(1) of the Act. The Respondent contends that Aldeano never made the remarks attributed to him by Pino and Perez, and that even if he had, the remarks were only an expression of Aldeano's personal views, and, thus, protected under the free speech proviso of Section 8(c) of the Act.[43] I find merit in the allegation.

As found above, Aldeano did in fact suggest to Pino and Perez on or around March 20, 2000, that they abandon the Union and throw their support to Company. Aldeano, however, did more than simply encourage them to abandon the Union. Rather, by making reference to the fact that former employee, Martinez, became a supervisor following the latter's withdrawal from the Union, and telling Pino and Perez that they stood to gain if they followed suit, Aldeano implicitly, if not explicitly, promised that Pino and Perez, like Martinez, would be similarly rewarded, possibly through promotion into Respondent's supervisory ranks, if they withdrew their support from the Union and supported the Respondent instead. Aldeano's encouragement to Pino and Perez that they abandon the Union, conditioned as it was on a promise of benefit, does not fall within the protective ambit of Section 8(c), as claimed by the Respondent, but rather was coercive and amounted to a violation of Section 8(a)(1) of the Act. *Multi-Ad Services, Inc.*, 331 NLRB 1226 (2000); *Gencorp*, 294 NLRB 717 (1989); *Heads & Threads Co.*, 261 NLRB 800, 809 (1982).

11. The June 2001 bargaining sessions

a. The June 11, events

In and around June 11–14, 2001, the Respondent and the Union were engaged in negotiations for a new contract covering employees at the Amelia/Corujo plant, as well as the Annex and dock facilities. At these negotiations, the Union was represented by A. Figueroa, Alberto Ortiz, Ivan Vazquez, Ruben Báez, Edwin Román, Andrés Sandoval, and Andrés Agosto.[44] González, Juarbe, and Curet represented the Respondent.[45]

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[43] Sec. 8(c) provides, in relevant part, that "[t]he expressing of any views, argument, or opinion ... shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

[44] Vazquez testified that A. Figueroa was chosen to be the Union's chief spokesperson during those negotiations because of an existing conflict between Gonzalez and Figueroa (III:349–350).

[45] Gonzalez testified that he initially refused to take part in the negotiations because he did not want to be in the same room with Figueroa, whom he accused of trying to assault him (Gonzalez), and of conspiring to murder or assassinate him. (VIII:533–534; 538–539.) He claims, however, that sometime in March 2001, employees Carlos Fernandez and Juan Vazquez asked him to join the negotiations because they were tired of its slow pace. These two employees, Gonzalez claims, had on prior occasions made similar requests of him. He further claims he told the employees that he would be willing to join the negotiations if the meetings could be held in the company offices and not at the Dept. of

Ortiz gave the following account of what occurred during the June 11, 2001 session. He recalls that as he, A. Figueroa, and the others were seated at a table awaiting the start of negotiations that day, Gonzalez entered the room and instructed A. Figueroa to move because the latter purportedly was sitting in his chair. A. Figueroa apologized to Gonzalez, stating that he knew everything in the room belonged to Gonzalez. The parties then began discussing the drug provision of the existing contract. Regarding this provision, the Respondent sought to have the word "drugs" replaced with the term "control substances." However, according to Ortiz, A. Figueroa opposed any such change in the wording of the provision and suggested that the language be left alone as the contract was about to expire. Gonzalez responded that he did not like the provision and wanted to change the language.

After some discussion, the bargaining session ended and the parties left. Ortiz recalls that on leaving the premises, he and the other union representatives huddled in the parking lot to discuss the events of the day. However, on seeing Gonzalez, Juarbe, and Curet approaching, Ortiz and the others dispersed to their vehicles. Ortiz claims that as he and Vazquez got into Ortiz' vehicle, Gonzalez approached, opened the passenger-side door, and asked Vazquez what had happened at the bargaining table. Both Juarbe and Curet, according to Ortiz, were present during this encounter (II:328). Gonzalez then told Vazquez that the drug test language he was proposing was better for employees than the one currently in the agreement. Vazquez responded that he did not believe that to be the case. Gonzalez then directed himself to Ortiz and asked if he, Ortiz, knew whether drugs or alcohol were being used at the Respondent's facilities, but Ortiz denied having any such knowledge. Gonzalez, Ortiz claims, then turned back to Vazquez and asked if knew that the Union was bankrupt. Vazquez replied that that was Figueroa's and A. Figueroa's problem. Gonzalez purportedly then stated that he did not want Figueroa coming to the plants anymore. Vazquez responded that Gonzalez should not allow the problem between himself and Figueroa to interfere with the collective-bargaining process. Ortiz recalls that at one point, he suggested to Vazquez that they should leave because he was tired, and that, soon thereafter, he heard Gonzalez tell Vazquez that he (Gonzalez) had a salary increase in store for employees (II:311–312; 330). According to Ortiz, Gonzalez directed himself mostly to Vazquez during this conversation, and that while other things were said, he could not recall much more of the conversation. (II:308–311.)

Vazquez corroborated much of Ortiz' testimony regarding what transpired between him and Gonzalez in Ortiz' vehicle on June 11, 2001. Thus, he confirmed that Juarbe and Curet were present during this encounter, that Gonzalez asked if he knew that the Union was bankrupt, and that Gonzalez at one point asked Ortiz if Respondent's employees used drugs and alcohol (III:352; 355; 379–380). Vazquez recalls discussing A. Figueroa with Gonzalez. He testified that he told Gonzalez that A. Figueroa was handling the negotiations so as to avoid conflict between Gonzalez and Figueroa. He further recalls stating that Gonzalez himself had expressed a preference of having A. Figueroa at the bargaining table. Gonzalez purportedly admitted that he indeed had asked to have A. Figueroa, instead of his son, Figueroa, at the bargaining table, but that he had come to realize that A. Figueroa and Figueroa "had the same blood." (III:357.)

According to Vazquez, during this encounter in Ortiz' vehicle, Gonzalez suggested that negotiations take place only between members of the parties' committees, without Gonzalez or any union official being present, and that if any agreements were reached, the committees would submit the agreements to their principals, e.g., Gonzalez and Figueroa for review and approval. Under Gonzalez' alleged proposal, negotiations would, thus, occur only between Juarbe and Curet for the Respondent, and the above-named employee representatives, sans A. Figueroa or Figueroa, for the Union. Vazquez told Gonzalez he would take the latter's proposal to the Union's committee for consideration and would get back to him. Vazquez, however, never got back to Gonzalez on the matter. (III:359–360.) Finally, Vazquez claims that at one point during this conversation, Gonzalez asked him and Ortiz if they wished to hear the recording containing Figueroa's alleged threat, but Vazquez declined to do so, noting that this was a personal problem between him and Figueroa and that this was the reason why there were problems with the negotiations (III:375).

As to the June 11, 2001 bargaining session, Gonzalez generally confirmed that the parties disagreed on whether the drug language in the current contract should be changed. Gonzalez, however, was never asked to confirm or deny having a conversation with Vazquez and Ortiz in the latter's vehicle in the parking lot after the meeting; he did deny, in general terms and in response to a leading question from Respondent's counsel, commenting about the Union being bankrupt. (VIII:527–528.) Gonzalez, however, did not deny telling Vazquez that he and other employee representatives on the Union's bargaining team should negotiate directly with Respondent's bargaining representatives without a union official or himself being present, or telling Vazquez that he and other employees had a salary increase coming. Juarbe, who, according to Ortiz and Vazquez, was present when Gonzalez made his remarks, was not asked to confirm or deny whether such remarks were made.

I credit Ortiz' and Vazquez' mutually corroborative, and unchallenged, assertion that Gonzalez approached both of them while they were in Ortiz' car following the meeting and engaged in some discussion. Thus, I find that Gonzalez suggested to Vazquez during that encounter that he and other members of the Union's bargaining team negotiate directly with Respondent's management team without the presence of any union official or Gonzalez, and that the union officials and Gonzalez would become involved only after the employee representatives and the management team came to an agreement. I also find that he told Vazquez that employees could expect a raise, and that the Union was bankrupt. While Gonzalez generally denied

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Labor, if they could find a solution to his problem with Figueroa because he was not going to be in the same room with Figueroa, and provided he, Gonzalez, was not assaulted or insulted. He testified that soon thereafter, A. Figueroa called him and said that he, A. Figueroa, would be heading the Union's bargaining team, and wanted the meetings held at the company offices, and asked if Gonzalez was willing to take part in the negotiations. Gonzalez claims he agreed to do so. (VIII:535–537.)

ever having commented that the Union was bankrupt, his denial in this regard was not credible. I believe instead, as asserted by both Ortiz and Vazquez, that Gonzalez indeed asked Vazquez during their conversation if he knew the Union was bankrupt.

b. The June 13, events

Ortiz and Vazquez also testified about a June 13, 2001 negotiating session involving the question of the 15-minute employee break. Vazquez recalled that during that meeting, when A. Figueroa sought to caucus with his team on the issue, Gonzalez stated that he was not there to waste time. A. Figueroa purportedly told Gonzalez that the purpose of the caucus was to discuss and hopefully clarify any misunderstandings that might arise on a particular issue. When Gonzalez asked A. Figueroa how much time he needed for the caucus, the latter responded, "whatever amount of time is necessary." According to Vazquez, Gonzalez and his team then left the room to allow the Union to caucus but returned some five minutes later, at which time A. Figueroa tells him his team was still caucusing. Gonzalez and his team again left the room but purportedly returned some 5 to 10 minutes later, only to be told again by A. Figueroa that they had not yet finished caucusing. Gonzalez, Vazquez recalls, then banged his hand on the table and sat down. A short while later, A. Figueroa told his team, "Let's get the hell out of here."

Agosto, a member of the Union's bargaining committee, attended the June 13, session and described the "caucusing" incident between A. Figueroa and Gonzalez. He recalls the meeting began with a discussion of the employees' breaktime, and that after the parties stated their respective positions, A. Figueroa indicated he needed to caucus with his team to discuss the Company's proposal. Agosto claims that Gonzalez became upset and stated that his time was valuable and that he had no time to waste on caucuses. Gonzalez nevertheless left the room presumably to allow the Union to caucus. However, he returned some 5 to 10 minutes later and stated he could not waste any more time, to which A. Figueroa responded that Gonzalez could not impose his manner of negotiating on him, and that Gonzalez had to give him some time to discuss the proposal. Acosta recalls Gonzalez responded to A. Figueroa but admits he did not hear what Gonzalez said. At that point, A. Figueroa stood up and, in an upset tone, stated, "I'm going to hell, I cannot tolerate this." The meeting, Agosto recalls, ended at that point. (IV:559–560.)

Gonzalez recalls that the June 13, bargaining session dealt with the 15-minute break for employees. He contends that on arriving at the meeting, he wanted to begin negotiations immediately but A. Figueroa stated he was not ready to start and needed to caucus with his team first. Gonzalez protested that they were ready to begin, but after some discussion left the room and allowed the Union to caucus. When he returned 10 minutes later, A. Figueroa stated he was not yet ready to proceed, and Gonzalez, after some protestation, again left the room. He returned ten minutes later at which time the parties began their negotiations. After some discussion, A. Figueroa, according to Gonzalez, again said he needed to caucus with his team. Gonzalez and his team left and, on returning some fifteen minutes later, was purportedly told by A. Figueroa that he did not want to be rushed. Gonzalez responded that A. Figueroa should come prepared to the negotiations because he, Gonzalez, did not have time to waste.

Gonzalez testified that the Company's position throughout the negotiations was that the contract language should be sufficiently clear so as to prevent misinterpretations. He explained that since A. Figueroa stepped down as union president, the Respondent had gone from handling few if any arbitrations to some 200 cases under Figueroa's presidency, creating a huge expense for the Company. Thus, he claims he told A. Figueroa that while the latter was the one negotiating the contract for the Union, he was not the one who would be administering the contract on a day-to-day basis. It was for this reason that he purportedly told A. Figueroa that the contract language agreed upon should be clear enough so that anyone reading it would know exactly what was meant. Gonzalez claims that A. Figueroa responded by telling him to "go to hell," that he did not need "to take this shit" from Gonzalez, then and got up and left with his team, ending the meeting. (VIII:529–531.)

Juarbe, who was also present at this meeting as a member of the Respondent's bargaining team, recalls that the purpose of the session was to discuss the employees' rest period. He claims that at one point during this meeting, Gonzalez stated that if the Union wanted him to be at the negotiations, they would have to expedite matters because he was going to be away for approximately 2 months; otherwise, the negotiations would have to await his return. Juarbe testified that the meeting lasted between 1 and 2 hours, and that towards the end of the meeting, A. Figueroa "suddenly and very unexpectedly" got up from his chair, told Gonzalez that "he didn't have to take this shit anymore and to go to hell." (VI:169.) A. Figueroa and his bargaining team then packed up their things and left.

On leaving the facility, the Union's bargaining team headed towards their respective vehicles. Vazquez recalls that on getting into Ortiz' vehicle, he turned around and saw Curet approaching the vehicle containing employees Agosto and Sandoval. Ortiz recalls that once in the vehicle, Vazquez told him to turn around and that, when he looked back, he saw Curet talking to Sandoval and Agosto.

Consistent with Ortiz' and Vazquez' observations, Agosto testified that Curet approached him and Sandoval and asked them to remain because Gonzalez wished to speak with them. Gonzalez showed up moments later and discussed various topics with them. According to Agosto, Gonzalez stated that he "was no longer going to negotiate" with either A. Figueroa or his son, Figueroa, that "there were more unions in Puerto Rico," and that they should find themselves another union with which he would be willing to negotiate. Agosto claims he told Gonzalez that the latter should remember that what was being negotiated at the bargaining table was for the benefit of the employees, not Figueroa. At one point, Gonzalez, according to Agosto, stated that his only regret about this entire matter was that it was the employees who were being prejudiced by the situation because a salary increase had already been included in his budget. Agosto then suggested that if what Gonzalez was saying was true, he should go ahead and give the raise. Gonzalez replied that he could not do so because if he did so, A. Figueroa would file a charge with the Board alleging that the

Company had failed to negotiate the raise with the Union. Agosto replied that if Gonzalez' truly wanted to give employees the raise, they should then proceed to negotiate over it. (IV:542–543.) The conversation, Agosto recalls, pretty much ended at that point.

Gonzalez testified that after A. Figueroa and his team walked out of the June 13 meeting, he and his team turned off the lights and left the building. He claims that on exiting, he found Agosto and the other union representatives mulling around and talking among themselves. According to Gonzalez, he and Sandoval engaged in some brief chit-chat about the anxiety Sandoval was purportedly experiencing. Following that brief discussion, Gonzalez claims he repeated to Agosto and the other employees gathered that they should work on obtaining a good contract. He explained to the employees that he would soon be leaving on vacation and would be away for 6 months, and that, in the meantime, employees should "proofread" the contract so that when he returned from vacation, it would be ready for him. Gonzalez purportedly further told the employees that Curet and Juarbe would be made available to them during company hours to assist in the proofreading. Gonzalez explained to the employees that unlike A. Figueroa, who was reviewing every letter in the contract and going over it word for word, he did not have time to pore over the contract paragraph by paragraph, which is why he wanted the employees to proofread it so that it could be ready for him on his return from vacation. (VIII:538–539.) Gonzalez was not questioned about, and consequently neither confirmed nor denied, the statements attributed to him by Agosto to the effect that, following the June 13 meeting, Gonzalez told him and Sandoval he would no longer negotiate with Figueroa or A. Figueroa, that employees should find themselves another union to represent them, and that he would not give employees a salary increase because the Union might accuse him of failing to negotiate over the raise. I credit Agosto's testimony in this regard.

c. June 14, 2001, Gonzalez meeting with employees

Vazquez testified that on June 14, the parties did not meet to negotiate as they had been doing. Instead, he recalled that around midday, his shift supervisor, Humberto Santana, told him that Gonzalez wanted to meet with him and other employee members of the Union's bargaining team which included Carlos Fernandez, Ruben Baez, and Edwin Roman. At this meeting with Gonzalez, which Vazquez recalls was also attended by Curet, Gonzalez asked what was happening with the collective-bargaining agreement. When Vazquez answered that they were not having any problems, Gonzalez asked why the employees were not speaking up at the negotiations. Vazquez replied that employees would only create conflict by speaking out, and that the reason for having caucuses during negotiations was to allow employees to express themselves. He added that employees, in any event, had authorized A. Figueroa to speak for them at the bargaining table. Gonzalez, according to Vazquez, replied that this was why he wanted the collective-bargaining agreement to be clear, because he did not want Figueroa at the facility and that the latter would not be setting foot in the Company again. (III:369.) Vazquez claims that Gonzalez, as he had done a few days earlier on June 11, asked if he and the other employees wanted to hear the recording containing Figueroa's alleged threat, explaining that he wanted employees to see the type of representative they had selected. Curet, on Gonzalez' instructions, retrieved a recorder and the tape recording was played for the employees. Vazquez paid little attention to what was on the recording. Finally, Vazquez claims that Gonzalez repeated his suggestion, first made during their June 11 conversation in Ortiz' car, that the employee members of the Union's bargaining team should negotiate the agreement by themselves, and then submit it to the union representative and Gonzalez for final approval. (III:377.)

Roman also testified about the June 14, 2001 meeting and largely corroborated Vazquez' account. Thus, he recalls Curet being present, Gonzalez suggesting that the two bargaining committees meet and negotiate a contract without him and A. Figueroa being present, and Gonzalez playing the recording purportedly containing a threat by Figueroa. Roman further recalls Vazquez telling Gonzalez, in response to the latter's suggestion about the committees negotiating among themselves, that employees had already authorized A. Figueroa to bargain on their behalf. According to Roman, Gonzalez replied that while he, Gonzalez, could not be changed as a negotiator as he was the owner of the Company, the employees' choice of bargaining representative could be changed because the Union had many representatives. Finally, Roman claims that, at one point, Gonzalez made mention of raises that he had for employees, and that when Vazquez suggested he distribute the raises, Gonzalez replied that "when the collective bargaining agreement is negotiated, he will give us what we have asked for." (IV:524–528.)

Gonzalez was questioned about the June 14, 2001 meeting by Respondent's counsel. However, his testimony as to what occurred or what was said was ambiguous and confusing. Thus, when asked by his counsel whom he had met with on June 14, 2001, Gonzalez stated that he first wanted to lay some foundation for his answer and then proceeded to ramble on about how he initially did not want to take part in the negotiations, and how he eventually relented and agreed to get involved after being asked to do so by employees Fernandez and Vazquez. He eventually admitted asking Fernandez, Vazquez, Baez, and "some other employees" to meet with him on June 14. He recalls telling employees at this meeting that he was leaving for vacation and suggesting that they proofread the contract in his absence so that negotiations could be completed on his return. Gonzalez further recalled some discussion about the need for an elevator at one of Respondent's facilities. He made no mention whatsoever of having played the recording for the employees, or having asked employees to negotiate without their union representative. Gonzalez did not indicate if Curet was present at this meeting. Curet, who testified on other matters, was not questioned about the June 14, 2001 meeting.

I found Gonzalez' rather rambling account of the June 14, meeting not to be credible. I credit instead Vazquez' and Roman's mutually corroborative account and find that Gonzalez, as he did during his June 11 conversation with Vazquez, did in fact urge the employee members of the Union's bargaining committee at this June 14 meeting to engage in direct negotiations with the Respondent's bargaining committee members

without their union representative and designated spokesperson, A. Figueroa.

Discussion

The General Counsel contends, and I agree, that the Respondent violated Section 8(a)(5) and (1) when Gonzalez on June 11, and again on June 14, 2001, urged employee members of the Union's negotiating committee to bargain directly with their counterparts on the Respondent's bargaining team without A. Figueroa.

The Act prohibits an employer from dealing directly with employees at a time when they are represented by an exclusive collective-bargaining representative. See, e.g., *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944). Thus, an employer must deal in bargaining negotiations with the statutory representative and cannot bargain directly or indirectly with the employees. See *Borden, Inc.*, 308 NLRB 113, 128 (1992), citing *NLRB v. Insurance Workers*, 361 U.S. 477, 484–485 (1960); also *Ad-Art, Inc.*, 290 NLRB 590, 606 (1988). "The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." *Borden*, supra, quoting from *General Electric Co.*, 150 NLRB 192, 195 (1964).

The record here makes clear, and the Respondent does not contend otherwise, that during the June 2001 negotiations, A. Figueroa was the employees' designated spokesperson and representative. Thus, it was A. Figueroa who had the authority to bargain and speak on the employees' behalf, and with whom the Respondent was obligated to deal during the negotiations. By urging the employee members of the Union's bargaining committee to negotiate directly with the Respondent's bargaining team without their principal spokesperson, A. Figueroa being present, the Respondent, in effect, sought to avoid its bargaining obligations by bypassing the Union and dealing directly with employees. That this was its true intent was made clear by Gonzalez' June 13 comments to Agosto that he "was no longer going to negotiate" with either A. Figueroa or his son, Figueroa, that "there were more unions in Puerto Rico," and that they should find themselves another union with which he would be willing to negotiate. The Respondent's attempt to bypass the Union and to bargain directly with employees amounted to a breach of its duty to bargain in good faith with the Union, and, as stated, violated Section 8(a)(5) and (1) of the Act. *E. I. du Pont & Co.*, 311 NLRB 893, 918 (1993); *Weinreb Management*, 292 NLRB 428, 432 (1989).

I also find, as alleged in the complaint and as claimed by the General Counsel, that the Respondent unlawfully sought to undermine the Union in the eyes of its employees when Gonzalez, on June 11, 2001, told Ortiz and Vazquez that the Union was bankrupt. Gonzalez' remark, as noted, followed on the heels of his first unlawful attempt to persuade Vazquez and Ortiz to bargain directly with the Respondent without their union representative and chief spokesperson, A. Figueroa. As such, I am convinced that Gonzalez' unsubstantiated claim about the Union being bankrupt was meant to further undermine the Union in the hope that Vazquez, Ortiz, and other employees would become disaffected with, and abandon, the Union. Accordingly, I find that Gonzalez' "bankrupt" remark was coercive and a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and, at all times material, has been the exclusive collective-bargaining representative of the Respondent's employees in the following bargaining units identified as units A, B, and C:

UNIT A

All production and maintenance employees of the Respondent at its Amelia Industrial Park "Arroz Rico" plant and the Corujo plant, in Guaynabo and Bayamon, Puerto Rico, respectively, including but not limited to drivers, helpers, mechanics and electricians; but excluding all office clerical employees, guards, and supervisors as defined by the Act.

UNIT B

All production and maintenance employees of the Respondent at its rice plant located at Bo. Sabana, Guaynabo, including, but not limited to, drivers, helpers, mechanics, and electricians, but excluding all office clerical employees, guards, and supervisors as defined by the Act.

UNIT C

All chauffeurs and chauffeurs helpers employed by the Respondent at its facilities in Amelia Industrial Park, and Bo. Sabana rice plant in Guaynabo, and Corujo in Bayamon, but excluding all other employees, guards, and supervisors as defined by the Act.

3. The Respondent violated Section 8(a)(1) of the Act by urging employees to abandon the Union and implicitly promising them some unspecified benefits if they did so, by telling employees that the Union was bankrupt, and telling them that complaining to the Board would be an exercise in futility.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, and without first notifying or bargaining with the Union, establishing a ban on employee use of cell phones within its facilities; unilaterally instituting a training program for employees on its CSV-40 machines; unilaterally demoting or reclassifying employees from the A-skilled to the unskilled classification; unilaterally discontinuing its annual $500. bonus program for employees; unilaterally assigning bargaining unit work to supervisors and/or nonunit employees; failing and refusing to comply with the Union's August 16, 2000 request for relevant information needed for the performance of its representative duties; failing and refusing to comply with its contractual obligation to deduct Union dues from unit employees; and by refusing to bargain with the Union's designated representative, Figueroa, and denying him access to its facilities.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. Except as found herein, the Respondent has not engaged in any other unfair labor practices.

REMEDY

The Respondent, having engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, shall be ordered to cease and desist from engaging in such practices and to take certain steps to remedy the violations found.

To remedy the unlawful unilateral changes made in the unit employees' terms and conditions of employment, the Respondent shall be required to rescind the March 1, 2000 program it unilaterally instituted to train unit employees on the CSV-40 machine, its March 13, 2000 ban on employee use of cell phones in its facilities, and its March 2000, its demotion or reclassification of employees David Pino, Javier Garcia, Rodolfo Rodriguez, and Luis Perez from the A-skilled to the unskilled classification, and its discontinuation of the $500 yearly bonuse for employees, and to bargain, on request, over these or any other changes it might wish to make in the unit employees' terms and conditions of employment. The Respondent shall also be required to meet and bargain with Jose A. Figueroa as the Union's designated representative for purposes of negotiations or contract administration, or with any other representative so designated by the Union, and allow him access to its premises for such purposes.

The Respondent shall, within 14 days from the date of this Order, be required to reinstate Javier Garcia and Luis Perez[46] to their former A-skilled classifications, without prejudice to their seniority or other rights and privileges previously enjoyed. It shall also be ordered to make them whole for any losses in wages or other benefits they may have sustained due to their unlawful demotion in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall be required to accept and comply with the dues-checkoff assignments for employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz, and to provide the Union with the information requested in its August 16, 2000 request for information. Finally, the Respondent shall be required to post, in English and Spanish, an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc., Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally instituting a ban on employee use of cell phones in its facilities; instituting a "new equipment" training program; assigning bargaining unit work to nonunit employees and supervisors; demoting, downgrading, or reassigning unit employees from one job classification to a lower classification, discontinuing its $500-annual bonus, or making any other unilateral changes in its unionized employees' terms and conditions of employment without first notifying and bargaining with Congreso de Uniones Industriales de Puerto Rico, which is the exclusive bargaining representative of its employees in the following appropriate bargaining units:

UNIT A

All production and maintenance employees of the Respondent at its Amelia Industrial Park "Arroz Rico" plant and the Corujo plant, in Guaynabo and Bayamon, Puerto Rico, respectively, including but not limited to drivers, helpers, mechanics and electricians; but excluding all office clerical employees, guards, and supervisors as defined by the Act.

UNIT B

All production and maintenance employees of the Respondent at its rice plant located at Bo. Sabana, Guaynabo, including, but not limited to, drivers, helpers, mechanics, and electricians, but excluding all office clerical employees, guards, and supervisors as defined by the Act.

UNIT C

All chauffeurs and chauffeurs helpers employed by the Respondent at its facilities in Amelia Industrial Park, and Bo. Sabana rice plant in Guaynabo, and Corujo in Bayamon, but excluding all other employees, guards, and supervisors as defined by the Act.

(b) Refusing to meet or bargain with Jose A. Figueroa as the Union's designated representative in negotiations and on other contractually related matters, refusing to allow him access to its facilities as required by the parties' collective-bargaining agreements; refusing to provide the Union with requested information which it needs to comply with its statutory obligations as the unit employees' exclusive bargaining representative; and refusing to deduct union dues from unit employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz.

(c) Telling employees they should abandon the Union and promising to provide them with unspecified benefits if they did so; telling them that the Union is bankrupt; and telling employees that the filing of charges with the Board would be a futile gesture.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes made in the unit employees' terms and conditions of employment described above in paragraph 1(a), and bargain, on request, with the Union over these or any other changes we may wish to make in the unit employees' terms and conditions of employment.

[46] Employee Rodolfo Rodriguez, as noted, was terminated for reasons not alleged in the complaint to be unlawful. For reasons unknown, the General Counsel withdrew David Pino's from this particular allegation. Consequently, the reinstatement remedy is not applicable to them.

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Recognize and bargain with Jose A. Figueroa as the Union's designated representative for purposes of collective bargaining and contract administration, or with any other representative so designated by the Union, and allow Jose A. Figueroa access to its facilities for such purposes as required under the parties' agreement.

(c) Provide the Union with the information sought in its August 16, 2000 information request.

(d) Accept the dues deduction applications from, and begin deducting and remitting to the Union dues on behalf of, unit employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz.

(e) Within 14 days from the date of this Order, reassign employees Javier Garcia and Luis Perez to their former A-skilled classification, without prejudice to their seniority or other rights and privileges previously enjoyed.

(f) Make Javier Garcia and Luis Perez whole for any loss of earnings or benefits they may have suffered due to their unlawful demotion, with interest, in the manner described in the remedy portion of this decision.

(g) Within 14 days after service by the Region, post at its facilities Guaynabo, Puertp Rico, in English and Spanish language, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 23, 2003

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in the terms and conditions of employment of our employees who are represented by Congreso de Uniones Industriales de Puerto Rico, without first notifying the Union and affording it an opportunity to bargain over any such changes.

WE WILL NOT refuse to meet and bargain with Jose A. Figueroa as the Union's designated representative, and WE WILL NOT refuse to allow Jose A. Figueroa access to our facilities for purposes of contract adminstration.

WE WILL NOT fail and refuse to to provide the Union with requested information that is relevant to and necessary for the Union in the performance of its statutory representative duties. and WE WILL NOT refuse to deduct union dues for unit employees Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights by urging them to abandon the Union and promising them unspecified benefits if they did so; by telling them that the Union is bankrupt; and by telling them that the filing of charges with the Board would be a futile gesture.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind the March 13, 2000 unilateral ban we imposed on employee use of cell phones in our facilities; the March 1, 2000 training training program we unilaterally instituted for the CSV-40 machines, and our unilateral decision to discontinue the annual $500 bonus for employees, and WE WILL notify and, at the Union's request, bargain over these or any other change we wish to make in the unit employees' terms and conditions of employment.

WE WILL recognize and bargain with Jose A. Figueroa as the Union's designated representative for purposes of collective bargaining and contract administration, or any other representative so designated by the Union, and WE WILL allow Jose A. Figueroa access to our facilties for such purposes as required under our contract.

WE WILL furnish the Union with the information requested in its August 16, 2000 information request.

WE WILL, within 14 days from the date of the Order, reassign employees Javier Garcia and Luis Perez to the A-skill classification, without prejudice the seniority or other rights and privileges previously enjoyed.

WE WILL make Javier Garcia and Luis Perez whole for any loss of wages or other benefits they may have suffered due to their unlawful demotion to the unskilled classification, with interest.

WE WILL accept the dues deduction applications from unit Alberto Franco Mateo, Marcelo Franco Villegas, Daniel Castro, and Jorge Ortiz, and begin deducting and remitting such dues to the Union.

PAN AMERICAN GRAIN CO., AND PAN AMERICAN GRAIN MANUFACTURING CO., INC.